Supreme Court, U.S.
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No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

TOWN OF MULDROW, et al.,
Petitioners,

v.

SEQUOYAH COUNTY RURAL
WATER DISTRICT NO. 7,
Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

JAMES C. MILTON *
LINDA C. MARTIN
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
SUITE 500
320 SOUTH BOSTON AVENUE
TULSA, OK 74103-3725
(918) 582-1211

Counsel for Petitioners

* Counsel of Record

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

QUESTIONS PRESENTED

1. Is the Tenth Circuit's standard resolving doubts in favor of water districts in determining territory protected by 7 U.S.C. § 1926(b) inconsistent with federal law requiring strict interpretation of statutes providing protection from competition?

2. Has the Petitioner violated 7 U.S.C. § 1926(b) by continuing to provide water service to customers that were initially connected and provided with water service by the Petitioner prior to the funding date of the federal loan upon which the Respondent bases its Section 1926(b) protection?

3. May the Respondent recover under 42 U.S.C. § 1983 for the Petitioner's alleged violations of 7 U.S.C. § 1926(b), if the federal loan upon which the claim is based was satisfied by the Respondent prior to the Respondent's assertion of any claim of violation of Section 1926(b)?

PARTIES TO THE PROCEEDING

Petitioners

Town of Muldrow and the Muldrow Public Works Authority. The Muldrow Public Works Authority is a public trust, of which the Town of Muldrow is the sole beneficiary. Generally speaking, singular references to "the Petitioner," "Town of Muldrow," and "Muldrow" are intended to encompass both Petitioners.

Respondent

Sequoyah County Rural Water District No. 7. Referred to herein as "Sequoyah."

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit is reported at 191 F.3d 1192 (10th Cir. 1999). A copy of the Opinion is included in Appendix A, at page 1a. The Court of Appeals' order denying rehearing is unpublished, but is included in Appendix D, at page 55a. The Order and Judgment by the United States District Court for the Eastern District of Oklahoma are unpublished, but are included in Appendix B, at page 33a, and in Appendix C, at page 53a, respectively.

JURISDICTION

The United States Court of Appeals for the Tenth Circuit issued its Opinion on August 17, 1999. [Appendix A.] On August 31, 1999, Petitioners filed a timely Combined Petition for Rehearing and Petition for Rehearing *En Banc* ("Combined Petition"). The United States Court of Appeals for the Tenth Circuit denied the Combined Petition on September 28, 1999. [Appendix D.] This Petition for Writ of Certiorari is filed within 90 days of the denial of the Combined Petition. The Court's jurisdiction is sought under 28 U.S.C. §§ 1254(1), 2101(c), and 2106.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., art. I § 8, cl. 1
The Spending Clause

The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the

United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

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7 U.S.C. § 1926. Water and waste facility loans and grants.[1]

. . .

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

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[1] The full text of 7 U.S.C. § 1926 is set forth in Appendix E.

STATEMENT OF THE CASE

With this action, Sequoyah has claimed an exclusive right to serve water to commercial, industrial, and heavy residential areas in and around the Town of Muldrow, Oklahoma. With its claimed exclusive right, Sequoyah seeks to prevent Muldrow from serving the customers in these areas. The Town of Muldrow initiated water service to the customers in the disputed areas well before the action was initiated. In fact, Muldrow has provided water service to some of the disputed customers for many years prior to the funding of Sequoyah's current federal loan that serves as the basis of its claimed protection. Sequoyah has never provided water service to the disputed customers. [Appendix B, at p. 48a.]

Sequoyah bases its claims on 7 U.S.C. § 1926(b). Section 1926(b) provides anticompetitive protection – a safe harbor from antitrust liability – to public entities that accept federal loans for the construction of water distribution facilities in rural areas. Section 1926(b) prohibits the limitation or curtailment of water service that is provided or made available by the borrower. To fall within the prohibition, the limitation or curtailment must be accomplished through "inclusion of the area served ... within the boundaries of any municipal corporation or other public body, or by the granting of any franchise for similar service within such area during the term of such loan." 7 U.S.C. § 1926(b).

Over the years, Sequoyah and its predecessors have received four federal loans. In this case, Sequoyah has based its claimed Section 1926(b) protection on all four loans. Three of the four federal loans were originated long before this controversy arose – in 1969, 1970, and 1981. [Appendix

A, at p. 4a.] Those three loans were "satisfied in full" by Sequoyah in 1989, again long before this controversy arose. [Appendix A, at p. 4a; Appendix B, at p. 43a.] From 1989 through the funding date of its current loan, September 28, 1994, Sequoyah was not indebted to the federal government. [Appendix A, at p. 4a; Appendix B, at p. 45a.]

When the current federal loan was funded on September 28, 1994, Muldrow was already serving water to a number of the water customers that are at issue in this dispute. [Appendix A, at p. 5a.] In fact, two of the disputed water customers began receiving water service from Muldrow during the term of the three earlier loans that were satisfied in 1989. [*Id.*]

On October 14, 1997, Sequoyah filed a complaint seeking an injunction and a declaratory judgment preventing Muldrow from continuing to serve water to the disputed customers. Sequoyah also sought damages under 42 U.S.C. § 1983, based on its claim that Muldrow's water sales dating back to 1989 and earlier were in violation of Section 1926(b). Finally, in its Complaint, Sequoyah requested a constructive trust to be imposed on water lines owned and operated by Muldrow, again based on its claim that Muldrow's water sales to the disputed customers violated Section 1926(b).[2]

The District Court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 1337 because the case presented a federal question arising under 7 U.S.C. § 1926(b) and 42 U.S.C. § 1983. Both Sequoyah and Muldrow filed motions

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[2] Sequoyah also alleged federal antitrust claims and various state-law claims, all of which were dismissed by stipulation, and were not at issue before the Court of Appeals. [Appendix A, at p. 6a.]

for partial summary judgment under Rule 56(d) of the Federal Rules of Civil Procedure. The claims that were omitted from Muldrow's Rule 56(d) motion were dismissed by stipulation prior to the District Court's ruling on the competing Rule 56 motions. [Appendix B, at p. 34a.]

On June 12, 1998, the District Court granted summary judgment in favor of Muldrow based on undisputed facts establishing that Sequoyah had failed to "make service available" to the disputed water customers. [Appendix B, at p. 52a.] In the course of its Order, the District Court held that Sequoyah's Section 1926(b) protection resulting from the three original federal loans was extinguished when the loans were satisfied, and that "no action taken by Muldrow prior to that time is actionable." [Appendix B, at p. 45a.] The District Court entered judgment on June 12, 1998. [Appendix C.]

Sequoyah filed an appeal with the U.S. Court of Appeals for the Tenth Circuit. The Tenth Circuit reversed the District Court's Rule 56 summary judgment, finding material issues of fact on the issue of whether Sequoyah had "made service available" to the disputed water customers.

In its instructions to the District Court on remand, the Tenth Circuit resolved several issues in favor of Sequoyah. These issues are the subject of this Petition. First, the Tenth Circuit reversed the District Court's determination that Section 1926(b) protection is extinguished when the claimant's federal loan is satisfied. The Tenth Circuit held that "even if a water association has repurchased its loan and discharged its debt to the government, encroachments which occurred during the term of the loan are protected." [Appendix A, at p. 18a.]

Second, the Tenth Circuit held that water sales by Muldrow during the term of Sequoyah's current federal loan are actionable even if Muldrow first initiated water service to the disputed customer prior to the funding of Sequoyah's current federal loan. According to the Tenth Circuit, Sequoyah "may recover for encroachments occurring *or continuing* after ... the date on which it obtained [its current] loan from the FmHA, so long as it establishes that it made service available to those customers." [Appendix A, at p. 31a.]

Finally, the Tenth Circuit announced a liberal standard of statutory construction for Section 1926(b). "Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." [Appendix A, at 9a.]

ARGUMENT FOR GRANTING WRIT

The Court should grant certiorari in this case because the Tenth Circuit has announced a new liberal-interpretation standard for 7 U.S.C. § 1926(b). Section 1926(b) is an anticompetitive statute – a safe harbor from federal antitrust scrutiny. Section 1926(b) must be viewed as an exemption from federal antitrust liability, allowing rural water associations to establish and maintain monopolies that otherwise would be prohibited. The Tenth Circuit's liberal-interpretation standard is contrary to long-standing federal law requiring that exemptions from federal antitrust liability be construed narrowly. The new standard is also contrary to principles for interpretation of Section 1926(b) announced by the Sixth and Seventh Circuits. *See Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 (6th Cir. 1996); *CSL*

Utils., Inc. v. Jennings Water, Inc., 16 F.3d 130, 137 (7th Cir. 1993), *cert. denied*, 513 U.S. 812 (1994).

In applying its new liberal-interpretation standard to Section 1926(b), the Tenth Circuit has exceeded the scope of the text of the statute, and the congressional power behind the statute. The Tenth Circuit has used Section 1926(b) to impose liability on Muldrow for water sales to customers that were connected to Muldrow's water distribution system prior to the date of the federal loan that serves as the basis for Section 1926(b) protection. This application of Section 1926(b) is contrary to the express terms of the statute, which prohibit only "curtailment" and "limitation" of water service that is provided or made available by the protected water association "during the term of [the] loan." 7 U.S.C. § 1926(b).

Furthermore, with this retrospective application of Section 1926(b), the Tenth Circuit has pushed Section 1926(b) beyond the scope of the Spending Clause, which provides the congressional authority for the statute's enactment. States are provided with insufficient notice that acceptance of federal loans under this statute will result in a reshuffling of existing water providers. Under the Tenth Circuit's view of Section 1926(b), the simple occurrence of the funding of a federal loan can operate to divest a municipality of its investment in infrastructure, and oust the municipality from active provision of water services to existing customers.

Finally, the Tenth Circuit has opened the door to damage awards against municipalities for water sales that occurred during federal loans that have long since been retired by the protected water association. In such instances, there is no need for injunctive or declaratory relief because

the federal loan is satisfied. By allowing such an action, the Tenth Circuit has found a remedy where there is no right.

With this case, the delicate structure of federalism hangs in the balance. If the Tenth Circuit's decision is allowed to stand, rural water associations will be allowed to derail industrial development and impose retrospective liability on well-intentioned, development-minded municipalities, using a federal statute as their sword. These gross actions by rural water associations will be enabled by a federal statute that was never intended to impede development in rural areas.

ARGUMENT 1

The Tenth Circuit's newly-announced liberal interpretation of Section 1926(b) is inconsistent with federal law on the construction of federal statutes that restrain competition.

While some federal courts have applied a liberal-interpretation standard to 7 U.S.C. § 1926(b), no federal court has gone quite so far as the Tenth Circuit. In *Muldrow*, the Tenth Circuit held that "[d]oubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory." [Appendix A, at p. 9a.] This liberal standard is unsupported by existing federal case law. More importantly, the broad standard is inconsistent with longstanding federal law on the construction of federal statutes that restrain competition.

Section 1926(b) must be viewed as an exemption from federal antitrust liability, allowing rural water associations to establish monopolies that otherwise would be prohibited by

federal antitrust laws. The Tenth Circuit recognized that Congress intended with Section 1926(b) "to protect rural water districts from competition in order to encourage rural water development." [Appendix A, at p. 8a (quoting *Grand Junction v. Ute Water Conservancy Dist.*, 900 P.2d 81, 88 (Colo. 1995).] This type of anticompetitive protection is directly contrary to the fundamental national economic policy that is embodied in federal antitrust laws. *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973).

As an exemption from federal antitrust liability, Section 1926(b) must be construed narrowly. The Court has long held that exemptions to antitrust laws are to be construed narrowly. *Jefferson County Pharmaceutical Assn. v. Abbott Labs.*, 460 U.S. 150, 159, *reh'g denied*, 460 U.S. 1105 (1983); *Abbott Labs. v. Portland Retail Druggists Assn.*, 425 U.S. 1, 11-12 (1976); *Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 733 (1973); *Perkins v. Standard Oil Co.*, 395 U.S. 642, 646-47, *reh'g denied*, 396 U.S. 871 (1969); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956) (Warren, C.J.).

In *McKesson & Robbins*, the Court rejected arguments for a broad construction of the Miller-Tydings and McGuire Acts, which authorized price-fixing agreements under limited circumstances. *McKesson & Robbins*, 351 U.S. at 310-11, 316. The base-line rule – that price-fixing agreements are illegal per se – was established by the Sherman Act. *Id.* at 310. The *McKesson & Robbins* Court properly construed the Sherman Act broadly, and its exemptions narrowly.

Similarly, in *Portland Retail Druggists Association*, the Court held that in enacting the exemption provision of the Nonprofit Institutions Act, the Congress "surely did not intend to give the hospital a blank check." *Portland Retail*

Druggists Assn., 425 U.S. at 13. "We therefore conclude that the exemption provision of the Nonprofit Institutions Act is a limited one; that just because it is a nonprofit hospital that is purchasing pharmaceutical products does not mean that all its purchases are exempt from Robinson-Patman ...." *Id.* at 14.

In *Seatrain Lines*, the Court narrowly construed a provision of Section 15 of the Shipping Act, which provided an antitrust exemption for certain agreements filed with the *Federal Maritime Commission*. *Seatrain Lines*, 411 U.S. at 726-28, 733. The Court rejected a broad reading of the statute because it

> would conflict with our frequently expressed view that exemptions from antitrust laws are strictly construed, and that "[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions."

Seatrain Lines, 411 U.S. at 733 (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963)) (citations omitted). In *Philadelphia National Bank*, the Court rejected an argument that the Bank Merger Act, by requiring bank regulatory agencies to consider competitive factors when approving mergers, "immunized approved mergers from challenge under the federal antitrust laws." *Philadelphia Nat'l Bank*, 374 U.S. at 350.

The federal courts applying Section 1926(b) protection cannot ignore this strict view of interpretation of anticompetitive federal statutes. In fact, several circuits have

construed Section 1926(b) in a limited manner. In 1993, the Seventh Circuit placed limits on the scope of Section 1926(b), even while recognizing the prevailing trend that "federal courts construing the statute have ... interpreted it liberally to protect FmHA-indebted rural water associations." *CSL Utils., Inc. v. Jennings Water, Inc.*, 16 F.3d 130, 137 (7th Cir. 1993), *cert. denied*, 513 U.S. 812 (1994). Despite the prevailing trend, the Seventh Circuit found limits on the scope of Section 1926(b) protection:

> This is not to say, however, that a government loan to a rural water association can totally freeze retail water utility development within the indebted association's service area. Some development is permissible even though the granting of a franchise or the inclusion of the service area within municipal boundaries are precluded.

CSL Utils., Inc., 16 F.3d at 137; *see also Rural Water Sys. No. 1 v. Sioux Center*, 967 F. Supp. 1483, 1520 (N.D. Iowa 1997) ("The purpose of § 1926(b) is not to protect a rural water association at all costs ....").

The applicability of the strict standard of construction for anticompetitive statutes is enhanced by an examination of the source of the current trend of liberal interpretation of Section 1926(b). Despite sweeping statements by the Fifth and Seventh Circuits, the liberal-interpretation standard applied to Section 1926(b) can be traced to only a handful of decisions.

In its *Muldrow* decision, the Tenth Circuit relies on decisions from the Fifth and Seventh Circuits in support of its announcement that "[d]oubts ... should be resolved in favor

of the FmHA-indebted party seeking protection for its territory." [Appendix A, at p. 9a (citing *North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996), and *Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989) (hereinafter *Jennings Water II*).] Neither of the cited decisions expressly supports the standard announced by the Tenth Circuit. Furthermore, the liberal-interpretation standard is not as deeply rooted as proclaimed by the Fifth Circuit in *North Alamo*. In fact, the liberal-interpretation standard finds its source in a misstatement of authority by the Seventh Circuit in *Jennings Water II*.

In *North Alamo*, the Fifth Circuit announced: "Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment." *North Alamo*, 90 F.3d at 913. However, the *North Alamo* court finds this conclusion in the Seventh Circuit's decision in *Jennings Water II*.[3] In *Jennings Water II*, the Seventh Circuit proclaims broadly that "[a]ll five federal courts that have reviewed section 1926(b) have concluded that the provision should be given a liberal interpretation that protects rural water associations indebted to the FmHA from municipal encroachment." *Jennings Water II*, 895 F.2d at 315. A review of the authorities cited by the *Jennings Water II* court reveal that this pronouncement by the Seventh Circuit is misleading, and should not serve as support for the liberal-construction standard applied by the Tenth Circuit.

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[3] The *Jennings Water* decision was also the source of a similar statement by the Sixth Circuit in *Wayne v. Sebring*, 36 F.3d 517, 527-28 (6th Cir. 1994), *cert. denied*, 514 U.S. 1127 (1995).

First, the *Jennings Water II* court cites *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The *Madison* court does not use the terms "broad application" or "liberal interpretation." Instead, the *Madison* court appears to be the source of the "congressional mandate" phrase that appears in many decisions interpreting Section 1926(b):

> The statute unambiguously prohibits any curtailment or limitation of an FmHA-indebted water association's services resulting from municipal annexation or inclusion. This language indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means. To read a loophole into this absolute prohibition, as Madison would have us do, and allow a city to do via condemnation what it is forbidden by other means, would render nugatory the clear purpose of § 1926(b).

Madison, 816 F.2d at 1059. A clear mandate and unambiguous statutory terms do not, however, equate with a liberal-interpretation standard.

The *Jennings Water II* court then cites *Moore Bayou Water Assn. v. Jonestown*, 628 F. Supp. 1367, 1369-70 (M.D. Miss. 1986), and argues that the *Moore Bayou* court construed Section 1926(b) as broad and absolute. The *Moore Bayou* court's decision, however, does not use the terms "broad" or "absolute." The *Moore Bayou* court found no ambiguity in the meaning of the statute, and determined that

its application would not lead to absurdity. "The section clearly prohibits *any* curtailment or limitation of the service provided by a rural water association resulting from the inclusion of all or a part of its territory within a municipality while the association is indebted to the FmHA." *Moore Bayou*, 628 F. Supp. at 1369-70 (emphasis in original).

The source of the liberal-interpretation standard can be found only through an examination of the *Jennings Water II* court's citation of *Glenpool Util. Auth. v. Creek County Rural Water Dist.*, 861 F.2d 1211 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989). There, the Tenth Circuit cites and quotes the district court decision that is under review by the *Jennings Water II* court. In 1988, the U.S. District Court for the Southern District of Indiana held that "[t]he clear message of the three federal cases applying 7 U.S.C. § 1926(b) and of the Senate Report is that the statute should not be construed narrowly to prohibit municipal encroachment only if technically by annexation or grant of a franchise, but should be applied broadly to protect rural water associations indebted to the FmHA from competition from expanding municipal systems." *Jennings Water, Inc. v. North Vernon*, 682 F. Supp. 421 (S.D. Ind. 1988) (hereinafter *Jennings Water I*), *aff'd*, 895 F.2d 311 (7th Cir. 1989).

The source, therefore, of the liberal-interpretation standard is a district court decision from 1988. Without considering the longstanding principal of strict interpretation for antitrust exemptions, the district court in *Jennings Water I* determined that the statute should be construed broadly to prevent municipalities from finding loopholes in the statute's coverage. In doing so, however, the *Jennings Water I* court opened the floodgates for subsequent federal courts to impose liability on municipalities far beyond the level expressly contemplated by the Congress that drafted Section 1926(b).

This Court should grant certiorari in order to unravel the tangled web on which the liberal-interpretation standard of Section 1926(b) is based. The strict-interpretation standard for antitrust exemptions must be applied to Section 1926(b) in order to prevent undue judicial impediments on competition.

ARGUMENT 2

The Tenth Circuit has stretched Section 1926(b) beyond its text and the intent of Congress by imposing liability on Muldrow for water sales that began prior to the water district's current federal loan.

By applying a broad brush to its interpretation of Section 1926(b), the Tenth Circuit has stretched the statute beyond its text, beyond its purpose, and beyond the intent of Congress.

With the more limited interpretation of Section 1926(b) applied by the *CSL Utilities* court, discussed *infra*, it is clear that Muldrow would have received a different result had this case been decided in the Seventh Circuit. The *CSL Utilities* court held that Section 1926(b) "prohibit[s] another supplier (whether public or private) from *being substituted for, and from displacing*, the service of the rural water association.... The cases and fragments of legislative history available to us all seem to have in mind curtailment resulting from *substitution* of some third party as a water-supplier for [the disputed customer]." *CSL Utils., Inc.*, 16 F.3d at 135 (emphasis added).

Based on this narrow interpretation of Section 1926(b), applied by the *CSL Utilities* court, Muldrow would have been allowed to continue its water sales to existing water customers. The *CSL Utilities* court recognized that it is the

displacing or supplanting of a rural water association that runs afoul of Section 1926(b). If the displacement occurs prior to the federal indebtedness, there can be no Section 1926(b) violation for continued water sales to the municipality's existing water customer. *CSL Utils., Inc.*, 16 F.3d at 133 (holding that the restriction on private franchises found in Section 1926(b) is contingent upon a finding that the private franchise "was granted during the term of the FmHA loan"). On this critical point, the Tenth Circuit's decision is in conflict with the decision of the Seventh Circuit in *CSL Utilities*.

On this same critical point, the Tenth Circuit's decision conflicts with the Sixth Circuit's decision in *Lexington-South Elkhorn Water Dist. v. Wilmore*, 93 F.3d 230 (6th Cir. 1996). The *Lexington-South Elkhorn* court correctly recognized that a rural water association claiming Section 1926(b) protection must "make service available" "prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection." *Lexington-South Elkhorn*, 93 F.3d at 234.[4] The logical extension of this rule is that a municipality may avoid Section 1926(b) liability if it commences water service before the elements of Section 1926(b) are met – before the rural water association (1) makes service available or (2) becomes indebted to the federal government.

Despite the absence of a federal loan during the period from May 5, 1989 through September 28, 1994, the Tenth Circuit applied Section 1926(b) to Muldrow's initiation of water service during that period. [Appendix A, at p. 19a.] Ignoring the clear rule of the Seventh Circuit in *CSL Utilities*,

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[4] The Tenth Circuit recited the *Lexington-South Elkhorn* rule, [Appendix A, at pp. 21a-22a], but failed to apply it.

and the Sixth Circuit in *Lexington-South Elkhorn*, the Tenth Circuit held:

> [A]lthough Plaintiff cannot seek relief for encroachments occurring between May 5, 1989, and September 28, 1994, because it was not indebted to the FmHA during that period, we still must examine whether Plaintiff has established genuine issues of material fact concerning whether it made service available to the customers which Defendants began serving during that period. We undertake this inquiry for purposes of determining whether Plaintiff may seek relief for encroachments which continued beyond the date of the 1994 loan.

[Appendix A, at pp. 19a-20a.]

This retrospective application of Section 1926(b) scrutiny is contrary to the express terms of the statute. Section 1926(b) provides as follows:

> The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the

> association at the time of the occurrence of such event.

7 U.S.C. § 1926(b).

The operative terms in Section 1926(b) are "curtailed or limited." It is these actions that are prohibited by the statute. The terms are active verbs, and are roughly synonymous. The term "limit" is defined as "to curtail or reduce in quantity or extent." *Webster's Third New International Dictionary* 1312 (1976 ed.). The term "curtail" is defined as to "reduce in area or amount," or "to diminish." *Id.* at 558.

The statute then uses the terms "inclusion ... within," and "the granting of" to further define the actions that are proscribed by Section 1926(b). Again, the drafters of the statute used active verbs to define the conduct that is prohibited. The term "inclusion" is defined as "*the act of* including." *Webster's Third New International Dictionary* 1143 (1976 ed.) (emphasis added). In turn, the verb "to include" means "to take in, enfold, or comprise as a discrete or subordinate part or item of a larger aggregate, group, or principle." *Id.* The term "granting," or "to grant," means "GIVE, BESTOW, CONFER ... to make a conveyance of: give the possession or title of *esp.* by a deed or formal writing." *Id.* at 989.

The federal courts that have interpreted Section 1926(b) have summarized these proscribed actions with the term "encroachment." *See, e.g., North Alamo Water Supply Corp. v. San Juan*, 90 F.3d 910, 913 (5th Cir. 1996) (using the term "encroachment"), *cert. denied*, 519 U.S. 1029 (1996). The term "encroachment" is defined as "the act or action of encroaching." *Webster's Third New International*

Dictionary 747 (1976 ed.). The verb "to encroach" is then defined to mean "to enter by gradual steps or by stealth into the possessions or rights of another: TRESPASS, INTRUDE." *Id.*

Each of these terms encompasses an active violation of Section 1926(b), rather than a passive violation. For example, the Fifth Circuit has equated "encroachment" with "competing franchises, new or additional permit requirements, or similar means." *Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1059 (5th Cir. 1987). The *Madison* court read Section 1926(b) expansively to also prohibit a condemnation action by a municipality. *Id.* The difference between the condemnation action contemplated by the *Madison* court and the preexisting water service in the case before this Court is that a condemnation action is a positive action taken by a competitor, seeking to take existing customers and revenue from the protected rural water association. In a similar view of the active component of the conduct prohibited by Section 1926(b), the Seventh Circuit viewed the term "encroachment" as the *expansion* of water sales "to consumers located within the rural water association's territory." *Jennings Water, Inc. v. North Vernon*, 895 F.2d 311, 315 (7th Cir. 1989).

To run afoul of Section 1926(b), a municipality must actively compete for the disputed water customer, by moving into the disputed territory through *inclusion* of the territory within its corporate boundaries. Furthermore, Section 1926(b) requires that the prohibited actions occur "during the term of such loan." 7 U.S.C. § 1926(b). If the active competition or encroachment by the municipality occurs when there is no federal loan, then there is no Section 1926(b) violation.

It is in this sense that the Tenth Circuit improperly applied Section 1926(b). At least with regard to five disputed properties that were first served between May 5, 1989 and September 28, 1994, [Appendix A, at p. 5a], the active encroachment by Muldrow occurred when Sequoyah had no federal indebtedness. With regard to those five properties, the only thing that occurred after Sequoyah borrowed federal funds on September 28, 1994 is continued water sales by Muldrow to its existing customers.

Entirely absent from the clear and express terms of Section 1926(b) is a prohibition on the *continuation* of water sales by a municipality to an existing water customer. Also absent from the terms of Section 1926(b) is any indication that Congress intended for Section 1926(b) protection to be used to prevent a municipality from continuing water sales to an existing customer. Nowhere in the text of Section 1926(b) does Congress explain that a municipality may lose control of its infrastructure – its capital expenditures – simply because a federal loan has been extended to a neighboring rural water association.

Looking beyond the express terms of the statute,[5] Section 1926(b) must be interpreted consistently with the

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[5] To the extent that Section 1926(b) is ambiguous in its terms, it should not be interpreted to limit fundamental state legislative prerogatives, such as the provision of water service by municipalities. *See Gregory v. Ashcroft*, 501 U.S. 452, 460-64 (1991). Such prerogatives, through which "a State defines itself as a sovereign," are "powers with which Congress does not readily interfere." *Id.* at 460, 461. "Congress may legislate in areas traditionally regulated by the States. This is an extraordinary power in a federalist system. It is a power that we must assume Congress does not exercise lightly." *Id.* at 460.

federal power on which it is based. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 15 (1981) ("In discerning congressional intent, we necessarily turn to the possible sources of Congress' power to legislate ...."). In this case, the retrospective imposition of Section 1926(b) liability on municipalities for the continuation of water service to existing water customers is inconsistent with the federal Spending Clause power.[6]

In fact, the Tenth Circuit's application of Section 1926(b) – if it were consistent with congressional intent – is precisely the type of misapplication of the Spending Clause power that "has the potential to obliterate distinctions between national and local spheres of interest and power by permitting the federal government to set policy in the most sensitive areas of traiditional concern, areas which otherwise would lie outside its reach." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 1677 (1999) (Kennedy, J., dissenting).

Importantly, it is the application of Section 1926(b) by the Tenth Circuit, in direct contradiction of the clear and express terms of the statute, that runs afoul of the limits of Spending Clause power. The prevention of active

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[6] In 1988, the Tenth Circuit held that Section 1926(b) "is most appropriately viewed as a congressional enactment resting upon Congress' powers under the spending clause of the United States Constitution." *Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215 (10th Cir. 1988) (footnote omitted), *cert. denied*, 490 U.S. 1067 (1989). No federal court has held otherwise, *see Madison v. Bear Creek Water Assn.*, 816 F.2d 1057, 1061 (5th Cir. 1987), and the Petitioners respectfully agree with the *Glenpool* court, that spending power analysis is appropriate for Section 1926(b).

encroachment on water service "made available" by a federally-indebted rural water association arguably may fall within the congressional spending power. However, the framers could never have intended the Spending Clause to authorize Congress to forcibly remove a municipality from active water service to an existing customer – a customer first served when there was no federal loan. That is what the Tenth Circuit has done with its retrospective application of Section 1926(b).

This broad application of Section 1926(b) is rendered more damaging to the balance of the federal system by the fact that a private right of action has been attached to violations of Section 1926(b). "[D]efining the scope of the private cause of action in general, and the damages remedy in particular, 'inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken.'" *Davis*, 526 U.S. 629, 119 S. Ct. at 1677-78 (Kennedy, J., dissenting) (quoting *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 284 (1998)). "[T]his element of speculation is particularly troubling because it is in significant tension with the requirement that Spending Clause legislation give States clear notice of the consequences of their acceptance of federal funds." *Id.* at 1678 (Kennedy, J., dissenting).

The "clear notice" requirement is not met in this case. First, in enacting Section 1926(b), Congress failed to express clearly an intent to impose a restriction on competition of the magnitude contemplated by the Tenth Circuit. *See Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981). This is the type of "massive obligation" that "defies common sense." *Id.* As demonstrated above, the clear and express terms of the statute militate against the retrospective application adopted by the Tenth Circuit. Application of

Section 1926(b) to existing water customers is precisely the type of "post acceptance or 'retroactive' conditio[n]" that the Court rejected in *Pennhurst. Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 25 (1981). The Tenth Circuit has expanded the anticompetitive protection of Section 1926(b) from a preventative statute – restraining expansion of municipal water systems – to a coercive statute, forcing a municipal water system to give up existing customers and the attendant capital expenditures.

Second, the State of Oklahoma never had an opportunity to choose not to accept the funds that were borrowed by Sequoyah in 1994. Congress failed to state the conditions that the Tenth Circuit found in Section 1926(b) with sufficient clarity. The State's potential obligations under Section 1926(b) are largely indeterminate, *see Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 24 (1981), particularly in view of the retrospective application adopted by the Tenth Circuit. Acceptance of the funds under the conditions imposed by the Tenth Circuit would allow Sequoyah to oust Muldrow as water-service provider to customers that are already adequately served by Muldrow. [Appendix A, at p. 7a.] Because this eventuality was not clear from the text of Section 1926(b), the State was unable to make an informed choice regarding whether to accept the benefits of the federal loans contemplated by Section 1926. Given such an opportunity, the State would certainly have elected not to accept the funds.

Furthermore, in determining the scope of Section 1926(b), the Court must consider the ongoing nature of the federal loans extended under 7 U.S.C. § 1926. Once the federal loans are funded, the states lack the ready ability to unravel the resulting obligations. Even if state legislatures were to remove water associations' power to borrow from the

federal government,[7] existing federal loans would remain outstanding for indeterminable periods.[8] "Remedies to enforce spending power statutes must respect the privilege of the recipient of federal funds to withdraw and terminate its receipt of federal money rather than assume the further obligations and duties that a court has declared are necessary for compliance." *Guardians Assn. v. Civil Serv. Comm'n*, 463 U.S. 582, 597 (1983) (White, J., separate opinion).

As a final indication of the absence of congressional intent supporting the Tenth Circuit's broad interpretation of Section 1926(b), the imposition of Section 1926(b) liability under these circumstances would offend constitutional due process. In drafting 1926(b), Congress must have understood the statute to have conformed with the requirements of due process. In this case, the Tenth Circuit's application of Section 1926(b) has effected an unconstitutional taking of infrastructure and capital investment – and the rights to serve specific customers – owned by Muldrow.

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[7] *See Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215-16 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

[8] In an effort to remedy the imbalance created by the Tenth Circuit's broad application of Section 1926(b), state legislatures may be tempted to dismantle the statutes creating rural water associations. This result certainly would be inconsistent with the stated purpose of Section 1926(b), which is to "serve as protection of federal funds advanced under the congressional spending power and pursuant to a national policy concerned with water management and rural populations." *Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

When Muldrow initiated water service to five disputed water customers between May 5, 1989 and September 28, 1994,[9] there was no federal protection to prevent Muldrow from doing so.[10] In the absence of federal protection, the territory established by Sequoyah was nothing more than an artificial boundary prescribing the extent of Sequoyah's right to serve water. During this five-year period, Muldrow invested capital expenditures and constructed the infrastructure necessary to provide water service to these five disputed water customers.

On September 28, 1994, after Muldrow had completed these investments and initiated water service to the five disputed water customers, Sequoyah retreated to its offices and, without notice to Muldrow, borrowed funds from the federal government. Under the Tenth Circuit's view of Section 1926(b) protection, this simple act by Sequoyah of borrowing federal funds on September 28, 1994 was sufficient to divest Muldrow of the right to use its infrastructure and capital investment to continue water sales to the five disputed water customers.

By applying Section 1926(b) in this manner, the Tenth Circuit has appropriated the property of Muldrow without "just compensation." The Fifth Amendment protects the property of states from appropriation by the federal government without just compensation. *See United States v. Carmack*, 329 U.S. 230, 242 (1946), *reh'g denied*, 329 U.S. 834 (1947); *California v. United States*, 395 F.2d 261, 263 & n.4 (9th Cir. 1968). "This is true even when the property has

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9 [Appendix A, at p. 5a.]

10 [Appendix A, at p. 19a.]

been dedicated by the State to public use." *California*, 395 F.2d at 264 & n.5.

When viewed in light of the requirements of Due Process, the Tenth Circuit's broad interpretation of Section 1926(b) is inconsistent with the clear terms of the statute. Had Congress intended to effect a "taking" of municipally-owned water-service infrastructure as part of the funding of federal loans to rural water associations, it would have included a provision to compensate the municipality that is forced to give up its infrastructure. In the absence of such an expressed congressional intent, the Court can only conclude that the drafters of Section 1926(b) did not intend to supplant municipalities as water service providers under such circumstances.

Regardless of the source of congressional intent – the text of the statute, the limits of the spending power, or the constraints of due process – the Tenth Circuit's expansive interpretation of Section 1926(b) exceeded the statute's intended scope. In this case, the delicate balance of federalism has been interrupted by the Tenth Circuit's overly broad application of Section 1926(b). For these reasons, the Court should grant certiorari to address the proper interpretation of 7 U.S.C. § 1926(b).

ARGUMENT 3

By allowing Sequoyah's action against Muldrow for water sales occurring during a now-satisfied federal loan, the Tenth Circuit has approved compensatory damages in the absence of private rights secured by federal law.

In announcing its August 17, 1999 decision, the Tenth Circuit avoided an express determination of the remedies that might be available to Sequoyah for Muldrow's alleged misconduct. But by reversing the District Court on one critical issue, the Tenth Circuit cleared the way for compensatory damages against Muldrow, in the absence of a corresponding private right secured by federal law. As a result, the Tenth Circuit approved a private right of action based on Section 1926(b), under circumstances that fail to meet the requirements of *Maine v. Thiboutot*, 448 U.S. 1 (1980).

The District Court held that when Sequoyah "paid off its debt to the FmHA on May 5, 1989, the protections enjoyed by [Sequoyah] under § 1926(b) were extinguished and *no action taken by Muldrow prior to that time is actionable.*" [Appendix B, at p. 45a (emphasis added).] In reaching this conclusion, the District Court implicitly recognized that injunctive and declaratory relief would be unavailable for past water sales.[11] It is tautological that pre-

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[11] While noting that "Section 1926(b) does not create or specify a remedy for the enforcement of violations," the U.S. Court of Appeals for the Fifth Circuit noted that "an injunction has been the principal tool employed by the courts with which to enforce the statute and prevent violations." *North Alamo Water Supply Corp.*

1989 water sales – initiated and completed long before the instant lawsuit was filed – cannot be the subject of an injunction or declaratory judgment.

The Tenth Circuit reversed the District Court's ruling on this issue, effectively clearing the way for an award of compensatory relief by the District Court, for water sales occurring during the term of the federal loan that was satisfied by Sequoyah in 1989.[12] This decision was in error because

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v. San Juan, 90 F.3d 910, 917 (5th Cir.), *cert. denied*, 519 U.S. 1029 (1996).

[12] Despite reversing the District Court's decision on this issue, the Tenth Circuit expressed uncertainty regarding whether compensatory damages should be available to remedy water sales that occurred during the prior loan period. In footnote 6 of its decision, the Tenth Circuit begs the question of whether municipal water sales are actionable under Section 1983, after the water district's federal loan is satisfied. [Appendix A, at p. 18a.] "[A]ssuming that Plaintiff meets the requirements for § 1926(b) protection and that relief is not barred by the statute of limitations, the [district] court [on remand] must determine *what remedy is appropriate* for Defendants' encroachments of Plaintiff's territory." [*Id.* (emphasis added).]

Of course, 42 U.S.C. § 1983 is remedial in nature. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 617 (1979); *Miener v. Missouri*, 673 F.2d 969, 976 n.6 (8th Cir. 1982), *cert. denied*, 459 U.S. 909 (1982), *and cert. denied sub nom. Special School Dist. v. Miener ex rel. Miener*, 459 U.S. 916 (1982). Section 1983 merely ensures that an individual has a cause of action for constitutional violations, and authorizes a cause of action based on civil rights deprivations. *Chapman*, 441 U.S. at 617-18. "While *Thiboutot* makes explicit that a § 1983 cause of action extends to cover statutory violations, this ruling does not change the fact that § 1983 itself does not create substantive rights.

under these circumstances, Section 1926(b) does not secure rights in favor of Sequoyah.[13] *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 28 (1981); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

The interests supporting Section 1926(b) disappear when the protected debt is repaid. "When an issuer buys back its own bond and cancels the debt, ... it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to one of the main legislative purposes in enacting § 1926(b) – safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition *diminishes as its loans are repaid.*" *Scioto County Regional Water Dist. v. Scioto Water, Inc.*, 103 F.3d 38, 42 (6th Cir. 1996), *cert. denied*, 521 U.S. 1111 (1997).

The structure of Section 1926(b) militates against monetary awards against municipalities under these circumstances. A municipality's water sales to an existing water customer cannot be terminated at the demand of a competing rural water district, based simply on a fear of

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A § 1983 claim presumably must fail if the underlying statute does not create substantive rights." *Miener*, 673 F.2d at 976 n.6 (citing *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981)).

[13] The absence of a right secured by federal law would also prevent Section 1983 damages for water sales during Sequoyah's current federal loan. With this Petition, Muldrow focuses its *Thiboutot* argument on pre-1989 water sales because the Tenth Circuit has expressly allowed Sequoyah's action to proceed regarding pre-1989 water sales despite the clear unavailability of any relief that might be awarded for such water sales outside the terms of *Thiboutot* and Section 1983.

Section 1926(b) litigation. A municipality that terminates water sales to an existing customer faces a broad range of potential liability theories that are likely to be asserted by the customer whose water service is terminated. Faced with potential liability to the customer if water service is terminated, the municipality has little choice but to continue water sales to the existing water customer. These water sales can hardly be viewed as the type of "intentional" misconduct that might be remedied with compensatory damages. *See Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S. Ct. 1661, 1670 (observing that remedies are limited under Spending Clause statutes when alleged violation is unintentional). Perhaps more importantly, continuing water sales by a municipality to disputed water customers can only be viewed as consistent with the purpose of Section 1926(b).[14] Water sales that go unchallenged by the protected rural water association certainly cannot be viewed as inconsistent with Section 1926(b).

The purpose of Section 1926(b), and all remedies that might be based on the statute, is to protect the repayment of the FmHA loan owed by the rural water association. Once the rural water association has paid its FmHA loan, there would be no need *or basis* for an injunction preventing encroachment by a competing municipality. Similarly, there would be no need *or basis* for an award of damages based on

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[14] In applying *Pennhurst* to Section 1926(b), the Tenth Circuit observed that the conditions imposed by Section 1926(b) "serve as protection of federal funds advanced under the congressional spending power and pursuant to a national policy concerned with water management and rural populations." *Glenpool Util. Servs. v. Creek County Rural Water Dist.*, 861 F.2d 1211, 1215 (10th Cir. 1988), *cert. denied*, 490 U.S. 1067 (1989).

encroachment that may have occurred during the term of the now-satisfied federal loan.

With the satisfaction of the federal loan giving rise to Section 1926(b) scrutiny, there remain no rights to be secured in favor of Sequoyah. With no rights secured by the statute, there can be no private right of enforcement under 42 U.S.C. § 1983. For these reasons, the Tenth Circuit was in error in allowing a damages action to proceed against Muldrow for water sales that occurred over ten years ago.

CONCLUSION

It is only by granting certiorari in this case that the Court can put an end to litigation abuse based on 7 U.S.C. § 1926(b). By clarifying the standard for interpretation of this statute, and by explaining the remedies available under this statute, this Court can right the disturbed balance of federalism at its lowest level.

/s/_____
JAMES C. MILTON, ESQ.
Counsel of Record

Linda C. Martin, Esq.
Doerner, Saunders, Daniel & Anderson, L.L.P.
320 South Boston Ave., Ste. 500
Tulsa, Oklahoma 74103-3725
(918) 582-1211

Attorneys for Petitioners

APPENDIX A

PUBLISH
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

[Filed August 17, 1999]

No. 98-7090

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff- Appellant,

v.

TOWN OF MULDROW, an Oklahoma Town, and MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants - Appellees.

CITY OF BROKEN ARROW and OKLAHOMA MUNICIPAL LEAGUE, INC.,
Amici Curiae.

Appeal from the United States District Court for the Eastern District of Oklahoma

Court of Appeals Opinion - 8/17/99

(D.C. No. 97-CV-578-S)

Before **PORFILIO, McKAY**, and **TACHA**, Circuit Judges.

McKAY, Circuit Judge.

Plaintiff-Appellant Sequoyah County Rural Water District No. 7 appeals the district court's entry of summary judgment in favor of Defendants-Appellees Town of Muldrow, Oklahoma, and Muldrow Public Works Authority, a public trust.[1] Plaintiff filed this action under 42 U.S.C. § 1983 claiming that, as a debtor of the Farmers Home Administration (FmHA),[2] it was entitled to the protection of 7 U.S.C. § 1926(b), namely, the exclusive right to provide water service within its service area. Plaintiff alleged that Defendants deprived it of its § 1926(b) rights by providing water service to certain customers within Plaintiff's service area. Plaintiff also sought declaratory and injunctive relief to prevent Defendants from selling or continuing to sell water

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[1] Two amicus curiae briefs were submitted in this matter, one on behalf of the City of Broken Arrow and one on behalf of the Oklahoma Municipal League, Inc. Although we have considered the arguments presented by the amici curiae in our disposition of the issues raised by the parties, we decline to address their additional arguments. See Tyler v. City of Manhattan, 118 F.3d 1400, 1404 (10th Cir. 1997) (explaining that court should use its discretion to address additional arguments raised by amici curiae only in exceptional circumstances).

[2] Although the FmHA is now known as the Rural Utilities Service, see 7 C.F.R. § 1780.3(a), to avoid confusion we will refer only to the FmHA in this opinion.

within its service area as well as damages for Defendants' past encroachments.[3]

I.

Plaintiff is a rural water district incorporated by the Board of County Commissioners of Sequoyah County, Oklahoma, to develop and provide water service to the rural residents within its territory. See OKLA. STAT. ANN. tit. 82, § 1324.3. Plaintiff was initially established in October 1966 as Sequoyah County Rural Water District No. 4. In 1969, Sequoyah-4 was dissolved and all of its assets and liabilities were assigned to an entity called the Rural Water Corporation (RWC). Finally, in March 1991, the Board of Commissioners transferred all of the assets and liabilities of RWC into Sequoyah County Rural Water District No. 7, which is Plaintiff's current name.

Oklahoma law authorizes rural water districts to borrow money from the federal government to accomplish the purposes for which they are established. See OKLA. STAT. ANN. tit. 82, § 1324.10.4. As part of the Consolidated Farm and Rural Development Act, 7 U.S.C. §§ 1921-2009n, Congress authorized the Secretary of Agriculture to make or insure loans to nonprofit water service associations for "the conservation, development, use, and control of water."

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[3] Plaintiff also sought a constructive trust to remedy Defendants' alleged encroachments, but Defendants claim that Plaintiff has waived this issue on appeal by failing to raise it in its opening brief. Regardless of whether Plaintiff has waived this issue on appeal, we leave the issue of what remedy is appropriate for the district court on remand.

7 U.S.C. § 1926(a). In accordance with these provisions, RWC began borrowing funds from the FmHA in 1969 to build water service facilities. RWC eventually became indebted to the FmHA on three notes. The first note was dated April 14, 1969, and was in the amount of $384,000; the second was dated June 9, 1970, and was for $45,500; and the third, dated July 15, 1981, was for $388,000.

In 1989, RWC elected to repurchase its notes from the FmHA pursuant to a government debt buy-back program. See Omnibus Budget Reconciliation Act of 1986 [OBRA], Pub. L. No. 99-509, § 1001, 100 Stat. 1874 (1986), as amended by Agricultural Credit Act of 1987 [ACA], Pub. L. No. 100-233, § 803, 101 Stat. 1714 (1988) (codified at 7 U.S.C. § 1929a note). Accordingly, on May 5, 1989, RWC borrowed money from the National Bank for Cooperatives and purchased or paid off all of its then-outstanding indebtedness to the FmHA at a discounted rate. After the buy-back, each of the FmHA notes was marked "SATISFIED IN FULL--FmHA." Appellant's App., Vol. II at AP597, AP599. When RWC's assets and liabilities were transferred to Plaintiff in 1991, its obligations to the Bank were included in the transfer. Plaintiff remains indebted to the Bank at this writing. On September 28, 1994, as Sequoyah-7, Plaintiff took out another FmHA loan in the amount of $331,400 to fund the construction of a project entitled "Redline." Plaintiff remains indebted to the FmHA on the 1994 loan.

We are concerned in this case with three periods of time during which Plaintiff alleges that it was indebted to the FmHA and during which Defendants allegedly began serving customers within Plaintiff's territory. The first relevant period of time is between April 14, 1969, the date on which

RWC first became indebted to the FmHA, and May 5, 1989, the date on which RWC repurchased its loans from the FmHA. Sometime during this time period, Defendants began providing water service to two customers within Plaintiff's territory, the Gunter Ridge Addition and the Gold Crown Motel, which at the time was known as the Diana Motel.

Sometime between May 5, 1989, and September 28, 1994, the date on which Plaintiff obtained its final loan from the FmHA, Defendants began providing water service to the following additional customers within Plaintiff's territory:

(1) Cherokee Rock Addition, Lots 2, 13, and 14
(2) FWCC Trucking, location number 820138
(3) J.D. Hill, location number 820127
(4) Laster Realty Co., location number 839861
(5) Rasamy Mangboupha, location number 820149

After September 28, 1994, Defendants began serving the following customers within Plaintiff's territory:

(1) Cherokee Rock Phase I, Lots 1, 3-12
(2) Food Plus/Dollar General Store, location number 816937
(3) Bob Pruitt Property (John Bogner), location number 817806
(4) FWCC Trucking Office, location number 819929
(5) OK Industries (a/k/a OK Foods), location number 816893
(6) J.D. Hill Truckwash, location number 820166
(7) Doug Harvell, location number 820182

Both Plaintiff and Defendants filed motions for partial summary judgment, and Defendants filed a motion to dismiss Plaintiff's state law claims. In an Order dated June 12, 1998, the district court denied Plaintiff's motion for partial summary judgment, granted Defendants' motion for partial summary judgment, and dismissed Plaintiff's remaining claims.[4] The court first explained that to establish its entitlement to protection under § 1926(b), Plaintiff must prove that "(1) it is an 'association' within the meaning of the Act; (2) it has a continuing indebtedness to the FmHA; and (3) [Defendants have] encroached upon or invaded an area to which [Plaintiff] has 'made service available.' Appellant's App., Vol. III, Doc. 19 at AP957 (citation omitted). Noting that Defendants did not contest Plaintiff's status as an "association," the court then held that, because Plaintiff repurchased its 1969, 1970, and 1981 notes from the FmHa on May 5, 1989, it was no longer indebted to the FmHA. Thus, the court found that, as of May 5, 1989, the protection afforded to Plaintiff by § 1926(b) was "extinguished and no action taken by [Defendants] prior to that time is actionable." Id. at AP960. The court then evaluated whether Plaintiff was entitled to relief for encroachments occurring after September 28, 1994, the date on which Plaintiff obtained a new loan from the

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[4] Because the parties had entered a stipulation of dismissal as to Plaintiff's state law claims prior to the court's disposition of the partial summary judgment motions, the court noted that Defendants' motion to dismiss was moot. See Appellant's App., Vol. III, Doc. 19 at AP951 n.2. The parties also entered a stipulation of dismissal with respect to Plaintiff's two antitrust claims prior to the court's summary judgment order. See. id. Plaintiff has not raised these issues on appeal.

FmHA. Because it was undisputed that Plaintiff was indebted to the FmHA after September 28, 1994, this determination turned on whether Defendants had "encroached upon or invaded an area to which Plaintiff ha[d] 'made service available.'" Id. at AP961. The court concluded that Plaintiff had not made service available to the disputed customers because it had no duty under state law to do so, see id., and because it either did not have sufficiently proximate facilities or sufficient capacity to serve the customers. See id. at AP964-65. Its conclusion was based in part on the fact that Plaintiff "would require customers[] who are already being adequately served by [Defendants][] to pay for improvements to [Plaintiff's] distribution system." Id.

II.

We review the grant or denial of summary judgment de novo, and we apply the same legal standard employed by the district court pursuant to Federal Rule of Civil Procedure 56(c). See Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996). Summary judgment is appropriate only when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

> When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. If there is no genuine issue of material fact in dispute,

> then we next determine if the substantive law was correctly applied by the district court.

Wolf v. Prudential Ins. Co. of Am., 50 F.3d 793,796 (10th Cir. 1995).

This court has stated that "Congress enacted 7 U.S.C. § 1926(b) as part of a federal statutory scheme to extend loans and grants to certain associations providing soil conservation practices, water service or management, waste facilities, or essential community facilities to farmers, ranchers, and other rural residents." Glenpool Util. Servs. Auth. v. Creek County Rural Water Dist. No. 2, 861 F.2d 1211, 1214 (10th Cir. 1988). "The legislative history of section 1926(b) demonstrates that Congress intended to protect rural water districts from competition in order to encourage rural water development." City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81, 88 (Colo. 1995); see also S. REP. No. 566 (1961), reprinted in 1961 U.S.C.C.A.N. 2243, 2309 (explaining that 7 U.S.C. § 1926(b) was enacted "to assist in protecting the territory served by such an association facility against competitive facilities, which might otherwise be developed with the expansion of the boundaries of municipal and other public bodies into an area served by the rural system"). In addition, § 1926(b) was intended "to provide greater security for the federal loans made under the program." Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 173 F.3d 517, 520 (4th Cir. 1999).

Section 1926(b) states in full:

> The service provided or made available through any such association shall not be

> curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

7 U.S.C. § 1926(b). This court has held that to receive the protection against competition provided by § 1926(b) a water association must (1) have a continuing indebtedness to the FmHA and (2) have provided or made available service to the disputed area. See Glenpool, 861 F.2d at 1214. The purpose of the second inquiry is to determine whether the disputed customers are within the water association's service area, i.e., "that area to which [Plaintiff] provided service or made service available." Bell Arthur, 173 F.3d at *525*. Doubts about whether a water association is entitled to protection from competition under § 1926(b) should be resolved in favor of the FmHA-indebted party seeking protection for its territory. See North Alamo Water Supply Corp. v. City of San Juan, Tex., 90 F.3d 910, 913 (5th Cir. 1996) ("The service area of a federally indebted water association is sacrosanct. Every federal court to have interpreted § 1926(b) has concluded that the statute should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachments."); see also Jennings Water, Inc. v. City of North Vernon, Ind., 895 F.2d

311, 315 (7th Cir. 1989) (listing five federal courts which have concluded that § 1926 should be liberally interpreted to protect FmHA-indebted rural water associations from municipal encroachment).

In this appeal, Plaintiff first argues that the district court erred in finding that, when Plaintiff repurchased its notes from the FmHA, it lost the protection to which it was entitled under 7 U.S.C. § 1926(b). Plaintiff claims that it has been entitled to continued protection under § 1926(b) since 1969, when it first became indebted to the FmHA. Plaintiff also argues that all of the disputed customers are within its service area by virtue of both its legal duty to serve the customers and its capacity to serve the customers within a reasonable time after service is requested. At the very least, Plaintiff claims that genuine issues of material fact should have precluded summary judgment on the issue of whether it had or could provide sufficiently proximate and adequate facilities to serve the disputed customers within a reasonable time.

A.

We begin our analysis with the continuing indebtedness prong of § 1926(b). Because there is no question that Plaintiff was indebted to the FmHA between April 14, 1969, and May 5, 1989, and that Plaintiff again became indebted to the FmHA after September 28, 1994,[5] the

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[5] Defendants argue that, because Plaintiff obtained its 1994 loan from the FmHA to finance a particular project, this indebtedness could not be used to obtain protection for other

critical issue is the effect of Plaintiff's repurchase of its notes from the FmHA on its status as an FmHA debtor prior to 1994. Plaintiff argues that the repurchase did not disrupt its entitlement to protection from competition under § 1926(b), and that, as a result, it is entitled to relief not only for encroachments occurring prior to the repurchase but also for encroachments occurring between the date of the repurchase and the 1994 loan. Defendants urge us to affirm the district court's conclusions that the repurchase extinguished Plaintiff's protection under § 1926(b) and that any encroachments which occurred prior to May 5, 1989, are not actionable.

The legislative background of the loan repurchase program sheds some light on whether Congress intended the protection of § 1926(b) to extend to borrowers who repurchase their obligations from the federal government. Congress enacted provisions requiring the FmHA to sell its notes and other obligations "[a]s part of an overall effort to reduce the federal deficit." Ute Water, 900 P.2d at 89; see OBRA § 1001(a)-(e) (codified at 7 U.S.C. § 1929a note, subsections (a)-(e)). Subsequently, Congress amended OBRA by requiring the FmHA to provide rights of first refusal to its

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customers served by Defendants. We reject this argument for two reasons. First, even though the loan was used to fund a particular project, all of Plaintiff's territory was pledged as security for the loan. See Appellant's App., Vol. II, Doc. 12 at AP675-76. Second, we agree with the Bell Arthur court's recent conclusions that there is no statutory support for the "position that the scope of § 1926(b) protection is limited to the geographical area being financed by the loan. . . [and that] [i]t would defeat the protection[] intended by that section to [so] limit [it]. Bell Arthur, 173 F.3d at 524.

debtors before it attempted to sell the obligations to third party purchasers. See OBRA § 1001 (f), as amended by ACA § 803(f) (codified at 7 U.S.C. § 1929a note, subsection (f)). As part of the same series of amendments, Congress enacted the following provision:

> **Applicability of Prohibition on Curtailment or Limitation of Service.**--Section [1926(b)] . . . shall be applicable to *all* notes or other obligations sold or intended to be sold under this section.

OBRA § 1001(g), as amended by ACA § 803(g) (codified at 7 U.S.C. § 1929a note, subsection (g)) (emphasis added).

Although § 803(g) clearly extends the protection of § 1926(b) to situations in which the government sells notes or other obligations to third parties, courts have reached differing conclusions regarding whether § 803(g) extends the protection to issuers who repurchase their own notes or obligations from the government. The Colorado Supreme Court addressed the interpretation of § 803(g) in a case involving an issuer repurchase in which "the intent of the parties. . . was to keep the. . . bond active and not discharge the debt." Ute Water, 900 P.2d at 93. The intent of the parties was demonstrated not only by testimony to that effect but also by the fact that in transferring the bond back to the water district, the FmHA did not mark the instrument "'paid in full,' which would have canceled or discharged the debt." Id. at 94. Thus, the bond remained outstanding even "after the [water] [d]istrict reacquired the instrument." Id. The court held that § 803(g) extended the protection of § 1926(b) "to *all* notes and bonds sold by the FmHA–including those

reacquired by the issuer with the intent not to discharge the instrument, as in the present case." Ute Water, 900 P.2d at 92 (emphasis added). Thus, the result in Ute Water turned on the facts that the parties did not intend to extinguish the underlying debt and "that state law permitted a bond issuer to reacquire its own bond without extinguishing the debt." Scioto County Reg'l Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 41 (6th Cir. 1996) (citing Ute Water, 900 P.2d at 93), cert. denied, 521 U.S. 1111 (1997).

To date, only two federal circuit courts have addressed the issue of whether § 803(g) extends the protection of § 1926(b) to issuers who repurchase their own obligations from the government. Relying on applicable statutory language, congressional intent, and reasons of public policy, these courts have held that § 1926(b) does not apply to situations in which the issuer repurchases its own notes or other obligations from, and at the same time cancels its debt to, the government, in spite of the apparently contrary indication in § 803(g). See Bell Arthur, 173 F.3d at 523; Scioto Water, 103 F.3d at 42.

In Bell Arthur, the Fourth Circuit acknowledged that providing issuers who repurchase their notes with continuing protection from competition–the approach taken by the Colorado Supreme Court in Ute Water and advocated by Plaintiff in this case–"may have some superficial textual appeal" based on the language of § 803(g). Bell Arthur, 173 F.3d at 522. The court went on to explain, however, that "a closer reading of the applicable statutes reveals that such an interpretation is at odds with their language, the overall statutory structure, and the congressional purposes." Id. The critical distinction lay in the fact that when a third party

purchases a note from the FmHA "the issuer's indebtedness remains outstanding," but when an issuer purchases its own notes from the FmHA, and at the same time cancels the notes, "then the indebtedness ends." Id. at 523. According to the court, "[t]he latter transaction is actually a *retirement* of the debt by the issuer rather than a *sale* of the debt." Id. (emphasis added). Because "the issuer of the note who exercises the right of first refusal retires its debt *before* notes can be 'sold or intended to be sold[,]'. . . [the issuer] cannot receive the § 1926(b) protection granted by [§ 803(g)]." Id. Thus, the Fourth Circuit concluded that Congress

> could not have meant to include notes retired because retired notes need no protection. The protection afforded by § 1926(b) is meant to secure outstanding notes against default by protecting the income of the notes' issuer. When the indebtedness–whether to the federal government or to its assignees–is retired, however, no such protection is needed.

Id.

The Sixth Circuit similarly held that issuers who repurchase their notes from the FmHA are not entitled to continuing § 1926(b) protection. See Scioto Water, 103 F.3d at 42. According to the court, "[w]hen an issuer buys back its own bond and cancels the debt, . . . it no longer qualifies as a debtor for § 1926(b) protection." Id. In the instant case, because the FmHA marked the water district's bonds "'paid in full'" when the water district repurchased the bonds, the debt was "discharged, not sold." Id. Thus, the court held that, under the circumstances, § 803(g) applies only to

obligations sold to third parties, not to debts repurchased by issuers. See id.

We agree with the Bell Arthur and Scioto Water courts that § 803(g) does not extend the protection of § 1926(b) to issuers who repurchase their obligations from the government and in so doing discharge or cancel the underlying obligation to the government. The overall structure of the statutory scheme indicates that Congress did not intend § 803(g) to apply to issuer repurchases. Because Congress enacted the provision requiring the government to offer rights of first refusal to issuers after it enacted the provisions requiring the sale of its debt to the public, it is likely that Congress considered the two types of transactions to be separate. See OBRA § 1001(a) (codified at 7 U.S.C. § 1929a note, subsection (a)); see also ACA § 803(f) (codified at 7 U.S.C. § 1929a note, subsection (f)). It follows that in referring to notes or obligations "sold or intended to be sold" in § 803(g) Congress was referring only to sales to third parties. Section 803(f) lends credence to this interpretation because it directs the government to offer rights of first refusal to issuers "'*[b]efore* conducting a sale of a portfolio of notes.'" ACA § 803(f)(1) (codified at 7 U.S.C. § 1929a note, subsection (f)) (emphasis added); see Bell Arthur, 173 F.3d at 523.

Two additional justifications support this analysis. First, when the government sells a note or other obligation to a third party, it must provide some assurance to the third party about the likelihood that the debt will be repaid. As the Fourth Circuit explained in Bell Arthur, part of the reason Congress enacted § 803(g) was "undoubtedly to make [the loans the government was selling] more secure upon sale and thus more marketable." Bell Arthur, 173 F.3d at 523. By

extending the § 1926(b) protection to water associations "'during the term' of the loan," § 803(g) gives "the third party purchaser the same assurance of repayment that the federal government had had as the holder of the notes." Id. On the other hand, there is no need to provide assurance of repayment to an issuer who repurchases its own loan. Second, depending on the terms of a third party sale, the government may remain liable to the purchaser in the event of a default by the issuer. In comparison, when an issuer repurchases its notes from the government and simultaneously cancels them, there is no risk of continued governmental liability. We therefore hold that § 803(g) does not extend the protection of § 1926(b) to issuer repurchases when the underlying debt to the government is simultaneously canceled or retired.

In this case, as in Scioto Water, the notes Plaintiff repurchased from the FmHA were marked "SATISFIED IN FULL," Appellant's App., Vol. II at AP597, AP599, and thus "the debt was. . . discharged, not sold. " Scioto Water, 103 F.3d at 42. Because the § 1926(b) protection does not extend to issuers who repurchase their own notes or other obligations from the FmHA and in so doing discharge the underlying debt to the FmHA, Plaintiff may not seek relief for encroachments which occurred or continued to occur between the date of the repurchase, May 5, 1989, and the date of the final loan, September 28, 1994. However, we still must decide whether the encroachments which occurred prior to May 5, 1989, are actionable. Citing Scioto Water, 103 F.3d at 40-42, and the district court opinion in Bell Arthur, see Bell Arthur Water Corp. v. Greenville Utils. Comm'n, 972 F. Supp. 951,957-59 (E.D.N.C. 1997), the district court in this case held that, because the repurchase extinguished Plaintiff's

entitlement to protection under § 1926(b), no encroachments occurring prior to the repurchase were actionable. We disagree.

First, neither Bell Arthur nor Scioto Water supports the proposition that encroachments occurring prior to an issuer repurchase but during the term of indebtedness are not actionable. The Bell Arthur court simply held that the § 1926(b) protection did not extend *beyond* the date of the repurchase, see Bell Arthur, 173 F.3d at 523-24; it did not hold that water associations would not be entitled to relief for encroachments occurring *prior* to a repurchase, i.e., during the period of indebtedness. In fact, this question was not even before the Bell Arthur court because in that case the only alleged encroachment occurred in 1995, which was after the water association had repurchased its loans from the FmHA in 1989 and after it had obtained a new loan from the FmHA in 1993. See id. at 520-21. In Scioto Water, the court similarly was not required to decide the issue because the encroachment in that case occurred after the water district repurchased its debt from the FmHA. See Scioto Water, 103 F.3d at 40. As in Bell Arthur, the court merely held that the water district was not entitled to § 1926(b) protection for the period *after* it repurchased its bonds from the FmHA and canceled its debt. See id. at 42.

Second, we can think of no reason why a water association which repurchases or otherwise repays its debts should lose the protection to which it was entitled during the period of indebtedness. To so hold would defeat the purpose of offering the protection because a water association which repurchased or paid off its debt but which otherwise met the statutory requirements would have no recourse for

encroachments that occurred or began while it was indebted to the government. Such a rule clearly would defy the language of § 1926(b), which expressly prohibits encroachments "during the term of such loan." 7 U.S.C. § 1926(b). This rule would also create a disincentive for water districts to repay their loans and would encourage municipalities and other competitors to encroach without concern for any resulting liability. We therefore conclude that, even if a water association has repurchased its loan and discharged its debt to the government, encroachments which occurred during the term of the loan are protected.

Because Plaintiff was indebted to the FmHA prior to May 5, 1989, and after September 28, 1994, it has satisfied the first prong of the § 1926(b) analysis with respect to those periods. We therefore reverse and remand to the district court for further proceedings consistent with this opinion.[6]

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[6] On remand, the district court will be required to address at least three issues with respect to the pre-1989 period. First, as discussed in greater detail below, Plaintiff must demonstrate that it "made service available" to the customers that Defendants allegedly began serving before the repurchase date. Second, even if Plaintiff has met the requirements for § 1926(b) protection for this period, the applicable statute of limitations may bar Plaintiff from seeking redress. Finally, assuming that Plaintiff meets the requirements for § 1926(b) protection and that relief is not barred by the statute of limitations, the court must determine what remedy is appropriate for Defendants' encroachments of Plaintiff's territory.

B.

We now examine whether Plaintiff has established genuine issues of material fact with respect to the "made service available" prong of the § 1926(b) inquiry. Although we have determined that Plaintiff was indebted to the FmHA during the pre-1989 and post-1994 periods, we must assess whether Plaintiff made service available to the customers served by Defendants during those periods.[7] In addition, although Plaintiff cannot seek relief for encroachments occurring between May 5, 1989, and September 28, 1994, because it was not indebted to the FmHA during that period, we still must examine whether Plaintiff has established genuine issues of material fact concerning whether it made service available to the customers which Defendants began serving during that period. We undertake this inquiry for purposes of determining whether Plaintiff may seek relief for

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[7] Defendants argue that certain customers are not within Plaintiff's service area because it failed to comply with state law in forming its territory, as defined by state law, in 1991. However, because Defendants do not seem to challenge the district court's conclusion that Plaintiff "is a continuation of Sequoyah-4 and its successor, RWC," Appellant's App., Vol. III, Doc. 19 at AP957, the contours of Plaintiff's territory should be examined from the date it came into existence as Sequoyah-4. Further, this argument is not properly before us because the district court did not rule on it. For these reasons, we assume that the disputed customers are within Plaintiff's territory as it is defined by state law. Whether the customers are within Plaintiff's service area is the subject of this section of our opinion and depends on whether it made service available to them within the meaning of § 1926(b).

encroachments which continued beyond the date of the 1994 loan.

Courts are in disagreement about what is required to satisfy the "made service available" requirement of § 1926(b). One court has held that a water association may meet the requirement simply by showing that it has a legal obligation to provide water service to the customer. See North Alamo, 90 F.3d at 917 (holding that a legal duty to provide service is the "legal equivalent to. . . 'making service available' under § 1926(b)").[8] Generally, courts applying the legal duty test

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[8] Other courts have emphasized that the water association must have a legal right, under state law, to provide service to the customer. See Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 967 F. Supp. 1483, 1525 (N.D. Iowa 1997) (explaining that whether a water association has made service available depends partly on "legal authority to provide service"); Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 29 F. Supp.2d 975, 991 (N.D. Iowa 1998) (indicating that legal right to serve is required to demonstrate that association made service available); cf. Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky., 93 F.3d 230, 238 (6th Cir. 1996) (noting water district's lack of authorization to provide service under Kentucky law). The distinction between a legal *duty* to provide service and a legal *right* to provide service is crucial because, in our view, the latter is always required. Without a right to provide service arising from state law, a water association would be unable to assert its entitlement to protection under § 1926(b) in the first instance because the association would not legally have "provided or made available" any service. 7 U.S.C. § 1926(b); see also City of Sioux Ctr., 967 F. Supp. at 1527 ("Where an indebted association has no legal right to provide service, it is not required by [7 C.F.R. § 1942.17(n)(2)(vii)] to provide such service, and, logically, it also should not obtain

have looked to state law to make the determination. See, e.g., id. at 915-916 (examining utility's duty to provide service under Texas law); Bell Arthur, 173 F.3d at 526 (citing cases examining both existing facilities and state law duty to provide service and holding that nonprofit water corporation had no duty to serve under North Carolina law). Another approach to meeting the requirement is known as the "pipe[s]-in-the-ground" or "physical ability" test. Rural Water Sys. #1 v. City of Sioux Ctr., Iowa, 967 F. Supp. 1483, 1525 (N.D. Iowa 1997); see Pittsburgh County Rural Water Dist. No. 7 v. City of McAlester, No. CIV-97-185-B, 1997 WL 835210, at *6 (E.D. Okla. 1997). This test examines whether a water association "has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." Bell Arthur, 173 F.3d at 526; see also Lexington-South Elkhorn Water Dist. v. City of Wilmore, Ky., 93 F.3d 230, 237 (6th Cir. 1996) ("[W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served."). Finally, some courts have examined both the water association's state law duty to provide service and the proximity and adequacy of its facilities in determining whether it made service available. See Bell Arthur, 173 F.3d at 526. Regardless of the manner in which this second prong is satisfied, Plaintiff must have made service available "prior to the time an allegedly encroaching association beg[an] providing service in order to

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protection from § 1926(b) for its illegal provision of service."). In any event, neither party contests Plaintiff's right to provide service to the customers which are undisputably within its territory.

be eligible for [§] 1926(b) protection." Lexington-South, 93 F.3d at 237.

This court has not definitively established a standard for meeting the "made service available" requirement. In Glenpool, we relied on both the association's water "line adjacent to the property and its responsibilities [to provide water service] to applicants within its territory" in concluding that the water association had made service available to the disputed customer. See Glenpool, 861 F.2d at 1214. However, Glenpool did not hold that both a legal duty and proximate and adequate facilities *were required* to meet this element of § 1926(b). In fact, Glenpool did not expressly hold that Oklahoma water districts have a legal duty to provide service; it merely referred to a specific water district's "responsibilities to applicants within its territory" in affirming a factual finding by the district court. Id.

In this case, the district court specifically determined that Oklahoma "state law does not mandate or require rural water districts to provide water service." Appellant's App., Vol. III, Doc. 19 at AP961; see also Pittsburgh County Rural Water Dist., 1997 WL 835210, at *5 (concluding that Oklahoma law does not impose "any obligation or duty on. . . the district to provide service"). We agree. Under Oklahoma law, the provision of water service centers around the "benefit unit," which is defined as "a legal right to one service connection to the district's facilities and to participate in the affairs of the district." OKLA. STAT. ANN. tit. 82, § 1324.2(7). Landowners within a rural water district's territory may "subscribe to a number of [benefit] units in proportion to the extent [they] desire[] to participate in the benefits of the improvements" made by the districts. Id. § 1324:12. "As

long as the capacity of the district's facilities permits, participating members. . . may subscribe to additional units upon payment of a unit fee for each such unit." Id. Further, although water districts must inform the customers within their districts how many benefit units are available for subscription, the districts have discretion to grant benefit units to new applicants for service, who also must pay a unit fee. See id. Two features of these statutes convince us that Oklahoma water districts are not under a state law duty to provide service to the customers within their territories. First, water districts are not required to provide additional benefit units to existing customers unless they possess the capacity to do so. See id. The statutes do not oblige water districts to expand their facilities to provide additional service to existing customers. Second, water districts have discretion to decide whether to provide benefit units to new applicants. In short, we cannot discern from the Oklahoma statutes a legal obligation to provide service.

Although we have determined that there is no state law duty to provide service in this case, we think that the existence of such a duty is relevant to the "made service available" inquiry because it substantially affects the likelihood that the association has provided or readily can provide service.[9] Nevertheless, we do not think that a such a

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[9] Plaintiff argues, and we agree, that the federal regulations governing the FmHA loan program impose a duty to provide service on loan recipients. In fact, it is clear that by accepting loans from the FmHA, Plaintiff agreed to abide by the governing federal regulations, which specifically require the provision of adequate service to customers "within the service area who can feasibly and legally be served." 7 C.F.R.

duty, standing alone, is sufficient to meet the "made service available" requirement. For one thing, to hold that a legal duty is sufficient to meet the requirement would be contrary to the language of the statute, which provides protection only against curtailments of "service provided or made available" by water associations. 7 U.S.C. § 1926(b). In addition, allowing a water district to meet the requirement simply by showing a legal duty to serve may undermine one of the principal goals of the statute, which is to "encourage water development by expanding the number of potential users of such systems." City of Madison, Miss. v. Bear Creek Water Ass'n, Inc., 816 F.2d 1057, 1060 (5th Cir. 1987). "Inherent in the concept of providing service or making service available is the *capability* of providing service, or, at a minimum, of providing service within a reasonable time." Bell Arthur, 173 F.3d at 526. If a water association has a legal duty to provide service but has no proximate or adequate facilities or cannot provide them within a reasonable time, it is the customer who suffers. For these reasons, we think that the second prong of § 1926(b) should focus primarily on whether the water association has in *fact* "made service available," i.e., on whether the association has proximate and

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§ 1942.17(n)(2)(vii); see Wayne v. Village of Sebring, 36 F.3d 517, 528 (6th Cir. 1994) (stating that 7 C.F.R. § 1942.17(n)(2)(vii) requires applicants for FmHA funds to "agree, as a condition of receiving funds, that a person within the service area who can feasibly and legally receive water service has a direct and private right of action against the fund recipient if the recipient fails to make adequate service available"). Because all FmHA loan recipients are subject to this federal duty, however, we do not think that the "made service available" requirement should turn on this duty.

adequate "pipes in the ground" with which it has served or can serve the disputed customers within a reasonable time.

As mentioned above, a water association meets the "pipes-in-the-ground" test by demonstrating "that it has adequate facilities within or adjacent to the area to provide service to the area within a reasonable time after a request for service is made." Bell Arthur, 173 F.3d at 526. This is essentially an inquiry into whether a water association has the capacity to provide water service to a given customer. See id.; City of Sioux Ctr., 967 F. Supp. at 1525. Plaintiff argues that the district court incorrectly concluded that Plaintiff did not make service available because it either did not have facilities proximate to the customers or because its facilities were insufficient to meet the customers' needs. According to Plaintiff, genuine issues of material fact should have precluded summary judgment on these issues. We examine the customers in the order in which Defendants allegedly began providing service to them.

The Gunter Ridge Addition and the Gold Crown Motel are the only two customers which Defendants allegedly began serving between April 14, 1969, and May 5, 1989. The record shows that Plaintiff has a two-and-a-half-inch line running across the east side of the Gunter Ridge Addition and a two-inch line running across the west side. See Appellant's App., Vol. I, Doc. 6 at AP67. Both lines have been in existence since 1970. See id. The only evidence in the record indicates that the lines were large enough to meet the potable water needs of the development and that the lines could be upgraded to provide fire protection for

approximately $50,000.[10] See. id. at AP411. The record also shows that Plaintiff has a three-inch water line running across the south side of the property of the Gold Crown Motel, see id. at 67, which has been in existence since 1970, and that this line "would be sufficient to provide potable water service to the motel." Id. at AP411. We do not think that this evidence shows, as a matter of law, that Plaintiff did not have sufficiently proximate and adequate facilities to serve these customers or that it would be unable to provide adequate service within a reasonable period of time. To the contrary, we think this evidence at least establishes genuine issues of material fact as to whether Plaintiff's facilities were proximate and adequate to serve the disputed customers during the pre-1989 period.

With respect to the customers which Defendants began serving between May 5, 1989, and September 28, 1994, the record reveals the following:

(1) Cherokee Rock Addition: Plaintiff has a two-inch water line constructed in

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[10] For remand purposes, we point out that the United States District Court for the Northern District of Ohio recently held that, because § 1926(b) was not enacted to supply fire protection, a water association's capacity to provide fire protection is irrelevant to its entitlement to protection from competition under § 1926(b). See City of Sioux Ctr., 29 F. Supp.2d at 992-94; cf. Rural Water Dist. #3 v. Owasso Utils. Auth., 530 F. Supp. 818, 823 (N.D. Okla. 1979) (stating that § 1926(b) "was not enacted for the purpose[] of fire protection--it was enacted to provide means of securing a 'safe and adequate supply of running household water.'" (citation omitted)).

1970 which is approximately 200 feet from the development's connection to Defendants' water line. This line "would be sufficient to provide potable water service" but not to provide fire protection. Id. at AP411. Plaintiff also has a six-inch line constructed in 1982 which is approximately 1320 feet from the connection and "which is more than sufficient to meet all the water needs of the" development. Id. at AP66; see also id. at AP411 (stating that six-inch line could provide fire protection for a cost of approximately $7,000).

(2) FWCC Trucking:[11] Plaintiff has two-and-a-half-inch lines on the north and south sides of the property. See id. at AP411. Both lines were constructed in 1970. See id.

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[11] The record indicates that there are two separate FWCC properties, one of which Defendants began serving prior to 1994 and one of which it began serving after 1994. See Appellant's App., Vol. I, Doc. 5 at AP45 (referring to FWCC Trucking location number 820138, which Defendants began serving prior to 1994, and to FWCC Trucking location number 819929, which Defendants began serving after 1994). In any event, both properties have two-and-a-half-inch lines approximately 200 feet away. See id. at AP67, AP411.

(3) J.D. Hill (location number 820127): The record indicates that Plaintiff has a two-and-a-half-inch line approximately 200 feet to the west of this customer. See id. at AP67.

(4) Laster Realty Co.: Plaintiff has a two-and-a-half-inch line running across the west side of the property. See id. at AP68.

(5) Rasamy Mangboupha: Plaintiff has a two-and-a-half-inch line constructed in 1970 running approximately 400 feet south of this customer. See id. at AP68.

With respect to FWCC Trucking, J.D. Hill, Laster Realty Co., and Rasamy Mangboupha, the record indicates that Plaintiff's existing facilities could provide potable water service but not fire protection. See id. at AP411. However, fire protection could be obtained for these customers for approximately $50,000. See id. Like the evidence for the customers which Defendants began serving prior to May 5, 1989, this evidence is sufficient to establish genuine issues of material fact with respect to the proximity and adequacy of Plaintiff's facilities.

Finally, we think the evidence also precludes summary judgment on the customers which Defendants began serving after September 28, 1994. The record reveals the following as to these customers:

(1) Cherokee Rock Phase I: The record is unclear about Plaintiff's facilities with respect to this development. However, Plaintiff has alleged that the facilities for this area are the same as those for the Cherokee Rock Addition, described above, i.e., a two-inch water line approximately 200 feet from the development's connection to Defendants' water line and a six-inch line approximately 1320 feet from the connection.

(2) Food Plus/Dollar General Store: Plaintiff has a two-and-a-half-inch line constructed in 1970 running across the south side of this property. See id. at AP66.

(3) Bob Pruitt Property (John Bogner): Plaintiff has a two-and-a-half-inch line on the north side of the property and a two-and-a-half-inch line on the south of the property. See id. at AP 411. Both lines were constructed in 1970. See id.

(4) FWCC Trucking Office: Plaintiff has a two-and-a-half-inch line constructed in 1970 running approximately 400 feet to the south of this customer. See id. at AP67.

(5) OK Industries: Plaintiff has an eight-inch line constructed in 1982 approximately one mile to the east of this customer. See. id. at AP410. The record indicates that this line could be extended for approximately $50,000 to meet the customer's needs. See id.

(6) J.D. Hill Truckwash (location number 820166): Plaintiff has a two-and-a-half-inch line constructed in 1970 running about 400 feet to the south of this property. See id. at AP67.

(7) Doug Harvell: Plaintiff has a two-and-a-half-inch line running approximately 200 feet south of this customer. See id. at AP68.

Although Plaintiff's current facilities are sufficient for the customers' potable water needs, the record indicates that, for approximately $50,000, fire protection could be provided for the Food Plus/Dollar General Store, Bob Pruitt, FWCC Trucking, J.D. Hill Truckwash, and Doug Harvell properties. See id. at AP411. Plaintiff has presented sufficient evidence to withstand summary judgment with respect to whether its facilities were sufficiently proximate to these customers and with respect to whether it had the capacity to serve these customers within a reasonable time.[12]

In short, although additional clarifying proof may be needed to establish the exact distances between Plaintiff's lines and the disputed customers' properties, as well as Plaintiff's precise capacity to serve the disputed customers within a reasonable time, we conclude that Plaintiff has

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[12] Defendants argue that Plaintiff released its right to serve the Food Plus/Dollar General Store and the OK Industries customers and that it is now estopped to assert the right to serve these customers. See Appellee's Br. at 49. Because these issues were not considered by the district court and because the record is insufficient to address them, we leave these issues for the district court on remand.

established genuine issues of material fact with respect to whether it made service available to the customers. Indeed, the evidence indicating that Plaintiff's pipes ran across the property of certain customers is certainly sufficient to show that Plaintiff's facilities were proximate to those customers, and evidence showing longer distances between Plaintiff's pipes and the customers' properties clearly raises questions of fact on the issue of proximity. Viewing the evidence in a light most favorable to Plaintiff, we therefore conclude that summary judgment was improper on the issue of whether Plaintiff made service available for the two periods of time for which Plaintiff may seek relief under § 1926(b).

III.

In summary, because Plaintiff was indebted to the FmHA between April 14, 1969, and May 5, 1989, it is entitled to seek relief for Defendants' provision of service to the customers within Plaintiff's territory to which it establishes that it made service available. Although Plaintiff is not entitled to recover for any encroachments occurring or continuing between May 5, 1989, and September 28, 1994, because it was not indebted to the FmHA at the time, it may recover for encroachments occurring or continuing after September 28, 1994, the date on which it obtained another loan from the FmHA, so long as it establishes that it made service available to those customers. We also conclude that Plaintiff has established genuine issues of material fact regarding whether it made service available to the disputed customers for the encroachments occurring before 1989 and for those occurring or continuing after 1994. As noted above, evidentiary uncertainties should be resolved in favor of

Plaintiff, the party seeking to protect its territory, on remand.[13]

Accordingly, the district court's entry of summary judgment is REVERSED, and this case is REMANDED for further proceedings consistent with this opinion.

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[13] We decline to address the additional arguments raised by Plaintiff in its Reply Brief because they were not presented to the district court and are not relevant to our disposition of this summary judgment appeal.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed June 12, 1998]

No. 97-578-S

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA,
Plaintiff,
v.

TOWN OF MULDROW, an Oklahoma town and the MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants.

ORDER

The following motions are before the court for its consideration: (1) Plaintiff Sequoyah County Rural Water District 7's motion for partial summary judgment, (2) Defendant Town of Muldrow's motion for partial summary judgment, and (3) Defendant Town of Muldrow's motion to dismiss state law claims. Plaintiff Sequoyah County Rural

Water District No. 7 ("Sequoyah-7") filed this action against Defendants Town of Muldrow and Muldrow Public Works Authority (collectively referred to as "Muldrow") seeking to enforce the provisions of 7 U.S.C. § 1926(b), which allows federally indebted rural water associations to service their territories free from the competition of municipalities. Sequoyah-7 claims Muldrow has violated § 1926(b) by selling water within Sequoyah-7's territory. Sequoyah-7 seeks to enforce the provisions of § 1926(b) by invoking the enforcement provisions of 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202. Sequoyah-7 seeks declaratory and injunctive relief, as well as damages for Muldrow's past sales of water. The parties have fully briefed the issues necessary for the resolution of § 1926(b) liability.[1] Based on the foregoing reasons, the court finds the issues in favor of Muldrow and grants its motion for partial summary judgment. Sequoyah-7's motion for partial summary judgment is denied.[2]

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[1] This parties have submitted this matter for resolution on their respective briefs. At the pretrial conference, it was agreed that a trial on the issue of damages would be necessary only if the court held in favor of Sequoyah-7 on its § 1926(b) claims.

[2] Muldrow's motion to dismiss Sequoyah-7's state law claims is moot. In its motion to dismiss, Muldrow sought the dismissal of Counts 6, 7, and 8. By stipulation of dismissal dated February 23, 1998, the parties dismissed without prejudice Counts 4, 5, 6, and 7. Thus, the only remaining Count related to Muldrow's motion to dismiss is Count 8 - a request that the court declare all water lines and facilities constructed by Muldrow to serve residents within Sequoyah-7's territory be held in trust for the use and benefit of Sequoyah-7. Given the court's rejection of

BACKGROUND

Sequoyah-7 is an agency and legally constituted authority of the State of Oklahoma created for the purpose of developing and providing an adequate water supply to serve and meet the needs of rural residents within Sequoyah-7's territory. Muldrow owns and operates a water production plant and water distribution system within the Town of Muldrow. In March 1991, Sequoyah-7 was established as a public nonprofit rural water district. The history of Sequoyah-7, however, can be traced back to October 18, 1966, when the Board of County Commissioners of Sequoyah County, Oklahoma, declared certain lands to be incorporated and organized as Rural Water District No. 4, Sequoyah County, Oklahoma ("Sequoyah-4"). The area incorporated into Sequoyah-4 in 1966 included the areas which are now in dispute in the present controversy between Sequoyah-7 and Muldrow. In 1969, all assets and liabilities of Sequoyah-4 were assigned to the Rural Water Corporation ("RWC") and Sequoyah-4 was dissolved. RWC was formed as a nonprofit corporation, in part, to provide a waterworks and distribution for the and benefit of its rural system use water consumers. In March 1991, Sequoyah-7 was created and all assets and liabilities of RWC were transferred to Sequoyah-7.

Shortly after it was created in 1969, RWC began to borrow funds from the FmHA to construct certain water

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Sequoyah-7's legal arguments for a § 1926(b) violation, the attendant claim in Count 8 for a constructive trust has no merit. Thus, the court's ruling in favor of Muldrow on the motion for partial summary judgment related to the § 1926(b) claims likewise resolves Count 8 in favor of Muldrow.

system facilities. RWC would eventually become obligated to the Farmers Home Administration ("FmHA") on three notes - an April 14, 1969, note for $384,000, a June 9, 1970, note for $45,500, and a July 15, 1981, note for $388,000. In May 1989, RWC participated in a program enacted under the Agricultural Credit Act of 1987 whereby bond issuers such as RWC could buy back their government debt at a discounted rate. As a result, RWC borrowed funds from the National Bank for Cooperatives ("NBC") and purchased or paid off its outstanding indebtedness to the FmHA on May 5, 1989. All promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA." As part of the conversion process, RWC transferred to Sequoyah-7 its obligations to NBC. Sequoyah-7 remains indebted to NBC on the notes issued in favor of NBC. On September 28, 1994, Sequoyah-7 borrowed $331,400 from the FmHA to fund the construction of the "Redline" project and pump station. Sequoyah-7 remains indebted to the FmHA on the September 28, 1994, loan.

During the period of time RWC remained indebted to the FmHA April 14, 1969, to May 5, 1989 - Muldrow began selling water to customers within the territory claimed by Sequoyah-7 as its service area. Muldrow began selling to customers within the Gunter Ridge Addition and to The Gold Crown Motel f/k/a Diana Motel during this time period. After RWC paid off its loans on May 5, 1989, but before Sequoyah-7 became indebted to the Fm/HA on September 28, 1994, Muldrow began providing water service to the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Addition

Lot 2, Diana Click location number 293684/293733

Lot 13, Michael Schroeder, location number 293667

Lot 14, Kevin Hauger, location number 293678

FWCC Trucking location number 820138

J.D. Hill, location number 820127

Laster Realty Co., location number 839861

Rasamy Mangboupha, location number 820149

Doug Harvell, location number 820182

After Sequoyah-7 became indebted to the FmHA on September 28, 1994, Muldrow added the following customers claimed to be within Sequoyah-7's service area:

Cherokee Rock Phase I

Lot 1, Robert Powell
Lot 3, Twila McElhaney
Lot 4, Denny Sossemen
Lot 5, Gary Carmen
Lot 6, Clinton Rice
Lot 7, Denise & Lee Boyers

Lot 8, Henry Davis
Lot 9, Dane Leathem
Lot 10, Anthony Bowers
Lot 11, Donna Marion
Lot 12, Dennis Shryrock

Food Plus/Dollar General Store, location number 816937

Bob Prewitt Property (John Bogner), location number 817806

FWCC Trucking office, location number 819929

OK Industries (a/k/a OK Foods), location number 816893

J.D. Hill Truckwash, location number 820166

With respect to all of these customers, it is Sequoyah-7's position that Muldrow has violated § 1926(b) because it has sold water within Sequoyah-7's established territory.

DISCUSSION

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Anderson v. Liberty Lobby, Inc., 477 U.S.

242, 247-48 (1986). The moving party has the initial burden of demonstrating the absence of a genuine issue of fact. Celotex v. Catrett, 477 U.S. 317, 325 (1986). If this initial burden is satisfied, the nonmoving party then has the burden of coming forward with specific facts showing that there is a genuine issue for trial as to elements essential to the non-moving party's case. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986); Bacchus Indus., Inc. v. Arvin Indus., Inc., 939 F.2d 887, 891 (10th Cir. 1991). The nonmoving party cannot rest on the mere allegations of the pleadings, but must go beyond the pleadings and "set forth specific facts showing that there is a genuine issue for trial as to those dispositive matters for which [it] carries the burden of proof." Applied Genetics v. First Affiliated Securities, 912 F.2d 1238, 1241 (10th Cir. 1990).

"A fact is 'material' only if it 'might affect the outcome of the suit under the governing law,' and a dispute about a material fact is 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Thomas v. IBM, 48 F.3d 478, 486 (10th Cir. 1995) (quoting Anderson, 477 U.S. at 248). In this regard, the court examines the factual record and reasonable inferences therefrom in the light most favorable to the nonmoving party. Deepwater Invs. Ltd. v. Jackson Hole Ski Corp., 938 F.2d 1105, 1110 (10th Cir. 1991). This court's function is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson, 477 U.S. at 249. With these standards in mind, the court turns to the merits of parties' motions.

The central issue in this case is whether Muldrow has violated the statutory protections afforded Sequoyah-7 under

§ 1926(b) by selling water to consumers within Sequoyah-7's alleged territory.[3] Section 1926(b) is part of the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 *et seq.* ("the Act"). The Act authorizes the Secretary of Agriculture to make or insure loans to associations for a variety of reasons, including the "conservation, development, use, and control of water." 7 U.S.C. § 1926(a) (1). Section 1926(b) of the Act provides in pertinent part:

> [t]he service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any

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[3] As a preliminary matter, the court's jurisdiction over this controversy must be addressed. The language of § 1926(b) does not contain an enforcement mechanism. Nor does § 1926(b) contain language creating a private right of action. Courts which have addressed § 1926(b) claims have, however, permitted suits to be brought pursuant to the authority of 42 U.S.C. § 1983 for enforcement of § 1926(b) rights. Wayne v. Village of Sebring, 36 F.3d 517, 528-29 (6th Cir. 1994), cert. denied, 514 U.S. 1127 (1995); Rural Water System #1 v. City of Sioux Center, 967 F.Supp. 1483, 1503-05 (N.D. Iowa 1997). Thus, § 1983 is the procedural mechanism allowing Sequoyah-7 to enforce federally protected rights created under § 1926(b). City of Sioux Center, 967 F.Supp. at 1503-05. Moreover, the Declaratory Judgment Act, 28 U.S.C. §§ 2201(a) and 2202, provides an alternative enforcement vehicle for rural water districts seeking relief under § 1926(b). Id. at 1506-07; Lexington-South Elkhorn .Water Dist. v. City of Wilmore, 93 F.3d 230, 232 (6th Cir. 1996).

> private franchise for similar service within such area during the term of such loan. . . .

Sequoyah-7 claims to be an association entitled to the protections of § 1926(b) and, further, that Muldrow's actions of annexing certain areas and providing service to consumers within those areas are violations of § 1926(b) entitling it to relief.

Section 1926(b) is understood as "unambiguously prohibit[ing] any curtailment or limitation of a FmHA-indebted water association's services resulting from municipal annexation or inclusion." City of Madison v. Bear Creek Water Assoc., 816 F.2d 1057, 1060 (5th Cir. 1987). Thus, § 1926(b) operates a means to "encourage rural water development by expanding the number of potential users and to safeguard the financial viability of rural associations and Farmers Home Administration loans." Lexington South Elkhorn, 93 F.3d at 233. The language of § 1926(b) "indicates a congressional mandate that local governments not encroach upon the services provided by such associations, be that encroachment in the form of competing franchises, new or additional permit requirements, or similar means." Bear Creek Water Assoc., Inc., 816 F.2d at 1059.

In order for Sequoyah-7 to establish its entitlement to the protections afforded under § 1926(b), it must prove the following elements: (1) it is an "association" within the meaning of the Act; (2) it has a continuing indebtedness to the FmHA; and (3) Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Lexington-South Elkhorn, 93 F.3d at 234; Bell Arthur Water v. Greenville Utilities Com'n, 972 F.Supp. 951, 959 (E.D.

N.C. 1997). With respect to the first element, Muldrow does not contest Sequoyah-7's status as an "association." As a public nonprofit rural water district created for the purpose of developing and providing an adequate rural water supply, Sequoyah-7 clearly qualifies as an "association" under the Act.

Sequoyah-7 must next establish a continuing indebtedness to the FmHA. In assessing the extent of such indebtedness, Muldrow attempts to restrict Sequoyah-7's attachment to a debt obligation to the September 28, 1994, loan from the FmHA. Muldrow contends Sequoyah-7 cannot avail itself of any loan with the FmHA which predated Sequoyah-7's formation in March 1991. According to Muldrow, the 1969, 1970, and 1981 debt obligations between RWC and the FmHA are not to be considered when determining the extent of the continuing obligation between Sequoyah-7 and the FmHA. The court rejects Muldrow's argument. A review of the materials before the court reveals that Sequoyah-7 is a continuation of Sequoyah-4 and its successor, RWC. All three entities were established for the same purpose - to develop and provide an adequate rural water supply for residents of Sequoyah County, Oklahoma. Upon the formation of Sequoyah-7, all assets and liabilities of RWC became the assets and liabilities of Sequoyah-7. 82 O.S. § 1324.33. The statutes under which Sequoyah-7 was created specifically provide that corporations such as RWC, which were formed prior to December 1, 1988, "may organize and constitute a district subject to the provisions of the Rural Water, Sewer, Gas and Solid Waste Management Districts Act." 82 O.S. § 1324.31. The court concludes Sequoyah-7 is a continuation of the corporate entity RWC; therefore, Sequoyah-7 is entitled, for purposes of § 1926(b)

protection, to avail itself of the loans RWC made with the FmHA beginning in 1969.[4]

It is undisputed, however, that RWC's loans with the FmHA were paid off in 1989. As part of a Congressional effort to reduce the deficit, the Omnibus Budget Reconciliation Act of 1986 required the FmHA to sell some of its bonds and other obligations. Scioto County Regional Water Dist. No. 1 v. Scioto Water, Inc., 103 F.3d 38, 40 (6th Cir. 1996), cert. denied, 117 S.Ct. 2497 (1997). Under the Agriculture Credit Act of 1987, the Secretary of Agriculture was required to offer bond issuers such as RWC the option of buying back the debt obligations before the Secretary offered them to third parties. Id. On May 5, 1989, RWC took advantage of this buy out program and extinguished its debt to the FmHA by paying off its obligation at a discounted rate and refinancing through a loan with NBC. With respect to this buy out, Sequoyah-7's financial statements reflect that "[i]n 1989, these loans with outstanding balances of $655,766 were paid off in the discounted amount of $377,931, and were refinanced by a loan in the amount of $320,000 with National Bank for Cooperatives." The promissory notes to the FmHA were marked "SATISFIED IN FULL - FmHA" and the debt was no longer carried in the financial records of either RWC or Sequoyah-7.

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[4] Given this finding, the court need not address Muldrow's argument that Sequoyah-7 does not have § 1926(b) protection as a result of its September 28, 1994, loan because that loan was specifically directed to another project and it did not cover the areas in dispute. See Bell Arthur, 972 F.Supp. at 959-61.

Since the federal indebtedness was paid off on May 5, 1989, Muldrow contends the protections afforded under § 1926(b) were extinguished on that date inasmuch as the necessary element of a federal indebtedness is lacking. Sequoyah-7 objects to Muldrow's characterization of the May 5, 1989, buy out program and contends the notes were "sold" as opposed to "discharged" by the discounted pay out and refinancing. Sequoyah-7 contends this distinction is significant because a provision of the Agricultural Credit Act of 1987 (known as "subsection (g)") states that the curtailment prohibition of § 1926(b) "shall be applicable to all notes or other obligations sold or intended to be sold under this section." By arguing that it "purchased" the notes from the FmHA, Sequoyah-7 seeks to secure the benefit of the coverage provided by subsection (g) and retain its § 1926(b) protections.

The court rejects Sequoyah-7's argument. Subsection (g) has no application to an issuer such as RWC who cancels its debt to the FmHA and refinances the debt through another entity. Subsection (g) is intended for those situations where the FmHA sells a note or debt obligation to a third party. Under this later scenario, the protections of § 1926(b) should "follow the note" as the debt has not been extinguished, but rather, merely transferred to a third party via a sale by the FmHA. When the federal debt is extinguished by the issuer, however, there is no need to extend such protections. The rationale for this distinction has been stated as follows:

> When an issuer buys back its own bond and cancels the debt, however, it no longer qualifies as a debtor for § 1926(b) protection. This statutory interpretation is also faithful to

> one of the main legislative purposes in enacting § 1926(b) - safeguarding Farmers Home Administration loans. Although the government maintains an interest in providing affordable rural water service, its interest in protecting against competition diminishes as its loans are repaid.

Scioto Water, Inc., 103 F.3d at 42. Moreover, the fact that issuers receive a substantial money-saving incentive when paying off their debt to the FmHA supports the existence of a rational basis for extending protection only to obligations sold to third parties, and not to obligations purchased by debtors through the buy out program. Bell Arthur, 972 F.Supp. at 959. Thus, when RWC, Sequoyah-7's predecessor, took advantage of the FmHA buy out program and paid off its debt to the FmHA on May 5, 1989, the protections enjoyed by RWC under § 1926(b) were extinguished and no action taken by Muldrow prior to that time is actionable. See Scioto Water, Inc., 103 F.3d at 40-42; Bell Arthur, 972 F.Supp. at 957-59; City of Sioux Center, 967 F.Supp. at 1523.

The court must next address the protections available to Sequoyah-7 following the May 5, 1989, buy out. It is undisputed that neither RWC nor Sequoyah-7 became indebted to the FmHA between May 5, 1989, and September 28, 1994. Consequently, there is no § 1926(b) protection available to Sequoyah-7 during this time period as no federal indebtedness existed. On September 28, 1994, however, Sequoyah-7 became indebted to the FmHA. Thus, the court must evaluate whether Sequoyah-7's claims arising after

September 28, 1994, including the continuation of service by Muldrow in Sequoyah-7's protected area, are actionable.

In order to evaluate Sequoyah-7's claims in this respect, the court must turn to the third element for a § 1926(b) violation - whether Muldrow has encroached upon or invaded an area to which Sequoyah-7 has "made service available." Section 1926(b) does not define the term "made service available." One approach to defining this term is to determine whether the "association" has a state law duty to provide service to the area in question. See North Alamo Water Supply Corp. v. City of San Juan, Texas, 90 F.3d 910, 916 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996) (the existence of a state law duty to provide service "is the legal equivalent to"making service available under § 1926(b)); City of Sioux Center, 967 F.Supp. at 1530 (answer to question of whether a rural water district "had a legal right to serve depends entirely upon applicable state law.") Here, Sequoyah-7 cites to the Rural Water, Sewer, Gas and Solid Waste Management District Act, 82 O.S. §§ 1324.1-1324.35, §§ 1324.41-1324.50. The court has reviewed the provisions of this act and finds no duty or obligation on the part of Sequoyah-7 to provide water service. While rural water districts in Oklahoma are certainly formed in order to provide an adequate rural water supply to meet the needs of rural residents within the district's territory, state law does not mandate or require rural water districts to provide water service. Consequently, absent a legal obligation imposed under state law to provide water service to the area in question, the court must determine whether Sequoyah-7 has "made service available" under an alternative approach adopted by the federal courts which have addressed this issue.

An alternative test requires Sequoyah-7 to establish it has "made service available" by demonstrating its legal authority to serve the disputed territory in combination with a physical ability to do so.[5] The latter part of this inquiry is commonly referred to as the "pipe-in-the-ground test." City of Sioux Center, 967 F.Supp. at 1525; Bell Arthur, 972 F.Supp. at 961; see also Lexington-South Elkhorn, 93 F.3d at 237. The key component of this test is the proximity of the facilities to the area to be served:

> [W]hether an association has made service available is determined based on the existence of facilities on, or in the proximity of, the location to be served. If an association does not already have service in existence, water lines must either be within or adjacent to the property claimed to be protected by Section 1926(b) prior to the time an allegedly encroaching association begins providing service in order to be eligible for Section 1926(b) protection.

Lexington-South Elkhorn, 93 F.3d at 237. In addition to determining whether Sequoyah-7's physical structures - pipes in the ground - are present to serve the disputed territory, the

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[5] Because the court concludes Sequoyah-7 has failed to present sufficient evidence to establish that it has made service available to the disputed territory, the court need not decide whether Muldrow's activities constitute a curtailment of Sequoyah-7's service area. Moreover, the court need not address Muldrow's arguments related to its contention that Sequoyah-7 does not have the legal authority to service the disputed territory.

court also considers whether the structure has the physical ability or capacity to meet the consumers' needs and whether fiscal constraints placed on, or by, Sequoyah-7 impede its ability to service the area. See Bell Arthur, 972 F.Supp. at 962-63 (in determining that rural water district had not made service available, the court considered the capacity of the existing structure and the fact that the rural water district did not have funds available to build the necessary additional lines).

Sequoyah-7 does not contend it has provided water service to the disputed territory in the past. Nor does it contend that it is currently providing such service. Rather, Sequoyah-7's argument is that it "has the ability to provide water service and has made water service available to all of the customers in the dispute." Affidavit of Tommy Click at ¶ 21 (Plaintiff's Exhibit No. 1 to Plaintiff's Motion for Partial Summary Judgment). Sequoyah-7's evidentiary basis for this assertion is found in the affidavit of Tommy Click, Manager of Sequoyah-7. As to the disputed territory and corresponding consumers, Click provides the following details regarding Sequoyah-7's facilities:

> Cherokee Rock Addition - Sequoyah-7 has a 2" water line constructed in 1970 that is approximately 200 feet from the Addition's connection to the Muldrow line. If this line is not sufficient to meet all needs of the Addition, Sequoyah-7 has a 6" line constructed in 1982 approximately 1320 feet from the Addition's connection which is more than sufficient to meet all the water needs of the Addition.

Food Plus/Dollar Store - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the south side of this property to which the customer could connect.

FWCC Trucking Office - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Gunter Ridge Addition - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs across the east side of the Addition and a 2" line on the west side of the Addition to which the customers could connect.

OK Industries - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

The Gold Crown Motel f/k/a Diana Motel - Sequoyah-7 has a water line that is approximately 1 mile east of the property to which the customer could connect.

J.D. Hill Truckwash - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the west of the property to which the customer could connect.

J.D. Hill - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

Doug Harvell - Sequoyah-7 has a 2 ½" water line approximately 200 feet to the south of the property to which the customer could connect.

Laster Realty Co. - Sequoyah-7 has a 2 ½" water line on the west side of the property to which the customer could connect.

Rasamy Mangboupha - Sequoyah-7 has a 2 ½" water line constructed in 1970 which runs approximately 400 feet south of this property to which the customer could connect.

Based on this information, Sequoyah-7 contends it has satisfied the § 1926(b) requirement of having "made service available" to the disputed territory.[6] The court disagrees.

The mere fact that Sequoyah-7 has facilities near or within proximity to the areas and customers in question is insufficient. In Lexington-South Elkhorn, the Sixth Circuit rejected a similar argument. The distribution lines of the rural water district in Lexington-South Elkhorn were located fifty yards from one property and ranging from .1 to .4 miles from other properties. The Sixth Circuit, in affirming the district court's determination that the rural water district, Lexington-South Elkhorn, had not made service available,

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[6] Omitted from this list is any mention of Sequoyah-7's service facilities available with respect to the Bob Prewitt Property (John Bogner) and FWCC Trucking location No. 820138. Consequently, Sequoyah-7's § 1926(b) claim as to these two properties must fail due to the absence any proof that Sequoyah-7 has "made service available."

concluded that "[b]ased on the location of Lexington-South Elkhorn's distribution lines, it had not made service available prior to the time that [the municipality] began providing service to the disputed area." Id. at 237. Similarly, the distances of Sequoyah-7's water lines to the customers in question in this case, ranging from 200 feet to 1 mile, are not within sufficient proximity to establish that Sequoyah-7 has made service available to the disputed territory. Moreover, with respect to the Food Plus/Dollar General and OK Industries facilities, Sequoyah-7's 2 ½ inch water line is insufficient to service those customers' water needs. Without the capacity to deliver water in quantities sufficient to service these customers, it cannot be said that Sequoyah-7 has made service available. Bell Arthur, 972 F.Supp. at 962-63. Finally, in considering Sequoyah-7's argument for finding that it has made service available based on the proximity of its facilities, the court places great weight on the fact that Sequoyah-7 admittedly would require customers "to pay the cost to connect their facilities to Sequoyah-7's distribution system as provided by state law." The fact that Sequoyah-7 would require consumers, who are already being adequately serviced by Muldrow, to pay for improvements to Sequoyah-7's distribution system militates against a proximity finding in

favor of Sequoyah-7.[7] Id. Consequently, the court finds Sequoyah-7 is not entitled to protection under § 1926(b).

CONCLUSION

The court finds Sequoyah-7 to be ineligible for § 1926(b) protection because it has failed to make service available to the disputed territory and customers. Thus, Sequoyah-7's motion for partial summary judgment is denied and Muldrow's motion for partial summary judgment is granted. Sequoyah-7's claims for § 1926 (b) protection brought pursuant to 42 U.S.C. § 1983, the Declaratory Judgment Act, 28 U.S.C. § 2201(a) and 2202, and a constructive trust theory, are hereby dismissed. This action is therefore dismissed in its entirety.

IT IS SO ORDERED this 12th day of June, 1998.

/s/_____
Frank H. Seay
United States District Judge

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[7] The court likewise rejects Sequoyah-7's alternate solution to the proximity issue - supply proximity by converting Muldrow's water lines to Sequoyah-7's. Sequoyah-7 relies on North Alamo Water Supply Corp. v. City of San Juan, 90 F.3d 910 (5th Cir.), cert. denied, 117 S.Ct. 586 (1996), for this proposition. The court rejects this draconian remedy and finds it is not authorized by any legal authority. Sequoyah-7 has the affirmative obligation under section 1926(b) to make service available - it may not satisfy this obligation by riding the coattails of a municipality's constructive efforts to provide water service to consumers who would otherwise be without service.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF OKLAHOMA

[Filed June 12, 1998]

No. 97-578-S

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the STATE OF OKLAHOMA, *Plaintiff*,	)
v.	)
TOWN OF MULDROW, an Oklahoma town and the MULDROW PUBLIC WORKS AUTHORITY, a public trust, *Defendants*.	)

JUDGMENT

Pursuant to the court's order entered simultaneously herein granting the motion for partial summary judgment filed by Defendants Town of Muldrow and the Muldrow Public Works Authority, judgment is entered in favor of Defendants and against Plaintiff Sequoyah-7 County Rural Water District

No. 7 on Plaintiff's claims brought under the authority of 7 U.S.C. § 1926(b).

Judgment is so entered this 12th day of June, 1998.

/s/_____
Frank H. Seay
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

[Filed September 28, 1999]

No. 98-7090

SEQUOYAH COUNTY RURAL WATER DISTRICT NO. 7, an agency and legally constituted authority of the State of Oklahoma,
Plaintiff- Appellant,

v.

TOWN OF MULDROW, an Oklahoma Town, and MULDROW PUBLIC WORKS AUTHORITY, a public trust,
Defendants - Appellees.

ORDER

Before **PORFILIO, McKAY**, and **TACHA**, Circuit Judges.

Appellee's petition for rehearing is denied.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of

the panel and no judge in regular active service on the court requested that the court be polled, the suggestion is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

/s/_____
Deputy Clerk

APPENDIX E

7 U.S.C. § 1926. Water and waste facility loans and grants.

(a) Criteria; definitions; limitation on allowable uses of Federal funds; inclusion of interest or other income in gross income on sale of insured loan

(1) The Secretary is also authorized to make or insure loans to associations, including corporations not operated for profit, Indian tribes on Federal and State reservations and other federally recognized Indian tribes, and public and quasi-public agencies to provide for the application or establishment of soil conservation practices, shifts in land use, the conservation, development, use, and control of water, and the installation or improvement of drainage or waste disposal facilities, recreational developments, and essential community facilities including necessary related equipment, all primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents, and to furnish financial assistance or other aid in planning projects for such purposes. The Secretary may also make loans to any borrower to whom a loan has been made under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.), for the conservation, development, use, and control of water, and the installation of drainage or waste disposal facilities, primarily serving farmers, ranchers, farm tenants, farm laborers, rural businesses, and other rural residents. When any loan made for a purpose specified in this paragraph is sold out of the Agricultural Credit Insurance Fund as an insured loan, the interest or other income thereon paid to an insured holder shall be included in gross income for purposes of chapter 1 of

Title 26. With respect to loans of less than $500,000 made or insured under this paragraph that are evidenced by notes and mortgages, as distinguished from bond issues, borrowers shall not be required to appoint bond counsel to review the legal validity of the loan whenever the Secretary has available legal counsel to perform such review.

(2) The Secretary is authorized to make grants aggregating not to exceed $590,000,000 in any fiscal year to such associations to finance specific projects for works for the development, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas. The amount of any grant made under the authority of this paragraph shall not exceed 75 per centum of the development cost of the project to serve the area which the association determines can be feasibly served by the facility and to adequately serve the reasonably foreseeable growth needs of the area. The Secretary shall fix the grant rate for each project in conformity with regulations issued by the Secretary that shall provide for a graduated scale of grant rates establishing higher rates for projects in communities that have lower community population and income levels.

(3) No grant shall be made under paragraph (2) of this subsection in connection with any project unless the Secretary determines that the project (i) will serve a rural area which, if such project is carried out, is not likely to decline in population below that for which the project was designed, (ii) is designed and constructed so that adequate capacity will or can be made available to serve the present population of the area to the extent feasible and to serve the reasonably foreseeable growth needs of the area, and (iii) is necessary for an orderly community development consistent with a

comprehensive community water, waste disposal, or other development plan of the rural area.

(4)(A) The term "development cost" means the cost of construction of a facility and the land, easements, and rights-of-way, and water rights necessary to the construction and operation of the facility.

(B) The term "project" shall include facilities providing central service or facilities serving individual properties, or both.

(5) Application requirements

Not earlier than 60 days before a preliminary application is filed for a loan under paragraph (1) or a grant under paragraph (2) for a water or waste disposal purpose, a notice of the intent of the applicant to apply for the loan or grant shall be published in a general circulation newspaper. The selection of engineers for a project design shall be done by a request for proposals by the applicant.

(6) The Secretary may make grants aggregating not to exceed $30,000,000 in any fiscal year to public bodies or such other agencies as the Secretary may determine having authority to prepare comprehensive plans for the development of water or waste disposal systems in rural areas which do not have funds available for immediate undertaking of the preparation of such plan.

(7) Definition of rural and rural areas

For the purpose of water and waste disposal grants and direct and guaranteed loans provided under paragraphs (1) and (2), the terms "rural" and "rural area" mean a city, town, or unincorporated area that has a population of no more than 10,000 inhabitants.

(8) In each instance where the Secretary receives two or more applications for financial assistance for projects that would serve substantially the same group of residents within a single rural area, and one such application is submitted by a city, town, county or other unit of general local government, he shall, in the absence of substantial reasons to the contrary, provide such assistance to such city, town, county or other unit of general local government.

(9) Conformity with State drinking water standards

No Federal funds shall be made available under this section for a water system unless the Secretary determines that the water system will make significant progress toward meeting the standards established under title XIV of the Public Health Service Act (commonly known as the "Safe Drinking Water Act") (42 U.S.C. 300f et seq.).

(10) Conformity with Federal and State water pollution control standards

No Federal funds shall be made available under this section for a water treatment discharge or waste disposal system unless the Secretary determines that the effluent from

the system conforms with applicable Federal and State water pollution control standards.

The Secretary may make grants, not to exceed $1,500,000 annually, to public bodies, private nonprofit community development corporations or entities, or such other agencies as the Secretary may select to enable the recipients—

(i) to identify and analyze business opportunities, including opportunities in export markets, that will use local rural economic and human resources;

(ii) to identify, train, and provide technical assistance to existing or prospective rural entrepreneurs and managers;

(iii) to establish business support centers and otherwise assist in the creation of new rural businesses, the development of methods of financing local businesses, and the enhancement of the capacity of local individuals and entities to engage in sound economic activities;

(iv) to conduct regional, community, and local economic development planning and coordination, and leadership development; and

(v) to establish centers for training, technology, and trade that will provide training to rural businesses in the utilization of interactive communications technologies to develop international trade opportunities and markets.

(B) Criteria

In awarding the grants, the Secretary shall consider, among other criteria to be established by the Secretary–

(i) the extent to which the applicant provides development services in the rural service area of the applicant; and

The Secretary shall ensure, to the maximum extent practicable, that assistance provided under this paragraph is coordinated with and delivered in cooperation with similar services or assistance provided to rural residents by the Cooperative State Research, Education, and Extension Service or other Federal agencies.

(D) Authorization of appropriations

There are authorized to be appropriated to carry out this paragraph $7,500,000 for each of fiscal years 1996 through 2002.

(12)(A) The Secretary shall, in cooperation with institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307 and 308), or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, establish a system for the dissemination of information and technical assistance on federally sponsored or funded programs. The system shall be for the use of institutions eligible to receive funds under the Act of July 2, 1862 (12 Stat. 503-505, as amended; 7 U.S.C. 301-305, 307, and 308),

or the Act of August 30, 1890 (26 Stat. 417-419, as amended; 7 U.S.C. 321-326 and 328), including the Tuskegee Institute and State, substate, and regional planning bodies, and other persons concerned with rural development.

(B) The informational system developed under this paragraph shall contain all pertinent information, including, but not limited to, information contained in the Federal Procurement Data System, Federal Assistance Program Retrieval System, Catalogue of Federal Domestic Assistance, Geographic Distribution of Federal Funds, United States Census, and Code of Federal Regulations.

(C) The Secretary shall obtain from all other Federal departments and agencies comprehensive, relevant, and applicable information on programs under their jurisdiction that are operated in rural areas.

(D) Of the sums authorized to be appropriated to carry out the provisions of this chapter, not more than $1,000,000 per year may be expended to carry out the provisions of this paragraph.

(13) In the making of loans and grants for community waste disposal and water facilities under paragraphs (1) and (2) of this subsection the Secretary shall accord highest priority to the application of any municipality or other public agency (including an Indian tribe on a Federal or State reservation or other federally recognized Indian tribal group) in a rural community having a population not in excess of five thousand five hundred and which, in the case of water facility loans, has a community water supply system, where the Secretary determines that due to unanticipated diminution

or deterioration of its water supply, immediate action is needed, or in the case of waste disposal, has a community waste disposal system, where the Secretary determines that due to unanticipated occurrences the system is not adequate to the needs of the community. The Secretary shall utilize the Soil Conservation Service in rendering technical assistance to applicants under this paragraph to the extent he deems appropriate.

(14) Rural water and wastewater technical assistance and training programs

(A) In general

The Secretary may make grants to private nonprofit organizations for the purpose of enabling them to provide to associations described in paragraph (1) of this subsection technical assistance and training to—

(i) identify, and evaluate alternative solutions to, problems relating to the obtaining, storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas;

(ii) prepare applications to receive financial assistance for any purpose specified in paragraph (2) of this subsection from any public or private source; and

(iii) improve the operation and maintenance practices at any existing works for the storage, treatment, purification, or distribution of water or the collection, treatment, or disposal of waste in rural areas.

(B) Selection priority

In selecting recipients of grants to be made under subparagraph (A), the Secretary shall give priority to private nonprofit organizations that have experience in providing the technical assistance and training described in subparagraph (A) to associations serving rural areas in which residents have low income and in which water supply systems or waste facilities are unhealthful.

(C) Funding

Not less than 1 nor more than 3 percent of any funds appropriated to carry out paragraph (2) of this subsection for any fiscal year shall be reserved for grants under subparagraph (A) unless the applications, qualifying for grants, received by the Secretary from eligible nonprofit organizations for the fiscal year total less than 1 per centum of those funds.

(15) In the case of water and waste disposal facility projects serving more than one separate rural community, the Secretary shall use the median population level and the community income level of all the separate communities to be served in applying the standards specified in paragraph (2) of this subsection and section 1927(a)(3)(A) of this title.

(16) Grants under paragraph (2) of this subsection may be used to pay the local share requirements of another Federal grant-in-aid program to the extent permitted under the law providing for such grant-in-aid program.

(17)(A) In the approval and administration of a loan made under paragraph (1) for a water or waste disposal facility, the Secretary shall consider fully any recommendation made by the loan applicant or borrower concerning the technical design and choice of materials to be used for such facility.

(B) If the Secretary determines that a design or materials, other than those that were recommended, should be used in the water or waste disposal facility, the Secretary shall provide such applicant or borrower with a comprehensive justification for such determination.

(18) In making or insuring loans or making grants under this subsection, the Secretary may not condition approval of such loans or grants upon any requirement, condition or certification other than those specified under this chapter.

(19) Community facilities grant program

(A) In general

The Secretary may make grants, in a total amount not to exceed $10,000,000 for any fiscal year, to associations, units of general local government, nonprofit corporations, and federally recognized Indian tribes to provide the Federal share of the cost of developing specific essential community facilities in rural areas.

(B) Federal share

(i) In general

Except as provided in clauses (ii) and (iii), the Secretary shall, by regulation, establish the amount of the Federal share of the cost of the facility under this paragraph.

(ii) Maximum amount

The amount of a grant provided under this paragraph for a facility shall not exceed 75 percent of the cost of developing the facility.

(iii) Graduated scale

The Secretary shall provide for a graduated scale for the amount of the Federal share provided under this paragraph, with higher Federal shares for facilities in communities that have lower community population and income levels, as determined by the Secretary.

(b) Curtailment or limitation of service prohibited

The service provided or made available through any such association shall not be curtailed or limited by inclusion of the area served by such association within the boundaries of any municipal corporation or other public body, or by the granting of any private franchise for similar service within such area during the term of such loan; nor shall the happening of any such event be the basis of requiring such association to secure any franchise, license, or permit as a condition to continuing to serve the area served by the association at the time of the occurrence of such event.

(c) Repealed. Pub. L. 91-606, Title III, § 302(2), Dec. 31, 1970, 84 Stat. 1759

(d) Carryover of unused authorizations for appropriations

Any amounts appropriated under this section shall remain available until expended, and any amounts authorized for any fiscal year under this section but not appropriated may be appropriated for any succeeding fiscal year.